United States

Circuit Court of Appeals

For the Minth Circuit.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a Corporation,

Appellee.

and

PARK, BENZIGER & CO., INC., a Corporation,

Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

NOV - 6 1944

Pages 1 to 342

PAUL P. O'BRIEN, CLERK

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division. Digitized by the Internet Archive in 2011 with funding from Public.Resource.Org and Law.Gov

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

GEORGE M. NAUS, Esq., 155 Montgomery Street, San Francisco, California.

LOUIS H. BROWNSTONE, Esq., 235 Montgomery Street, San Francisco, California. Attorneys for Defendants and Appellants.

ALFRED F. BRESLAUER, Esq., 111 Sutter Street, San Francisco, California.

Mrs. THELMA S. HERZIG, 20 Romolo Place, San Francisco, California.

M. MITCHELL BOURQUIN, Esq., 620 Market Street, San Francisco, California.

GEORGE G. OLSHAUSEN, Esq., 220 Bush Street, San Francisco, California. Attorneys for Plaintiff and Appellee. In the Southern Division of the United States District Court for the Northern District of California.

No. 22625 S

PARK, BENZIGER & CO., INC., a corporation, Plaintiff,

VS.

PIERRE BERCUT and JEAN BERCUT, individually and as co-partners doing business as P & J Cellers, a co-partnership, FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT

Now comes plaintiff and complains of defendants and for cause of action against them alleges:

I

That this court has jurisdiction over this action because of the diversity of citizenship of the parties hereto.

II.

That at all the times herein mentioned, plaintiff Park, Benziger & Co., Inc. was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, and authorized thereby to carry on the business of buying and selling wines at wholesale, with its principal place of business at No. 24 State Street, in the City of New York, State of New York, and

plaintiff is a resident and citizen of the State of New York.

III.

That at all the times herein mentioned, Serge Hermann, assignor of the plaintiff, was and now is a resident and citizen of the State of New York.

IV.

That at all the times herein mentioned, defendants [1*] Pierre Bercut and Jean Bercut, individually and as co-partners doing business as P & J Cellars, First Doe and Second Doe, and each of them, was and now is a resident and citizen of the City and County of San Francisco, State of California.

V.

That the matter in controversy exceeds the sum of Three thousand Dollars, exclusive of interest and costs.

VI.

That on or about the 29th day of January, 1943, at the City and County of San Francisco, State of California, defendants entered into a written agreement with Serge Hermann wherein and whereby defendants sold and said Serge Hermann purchased, approximately 60,000 cases of wine, produced and bottled by Fruit Industries, Inc. of the 1937-1938 vintage, consisting of dry wines of several types, such as claret, sauterne, Rhine wine, and burgundy, at \$5.25 per case, F.O.B. San Francisco,

^{*}Page numbering appearing at foot of page of original certified Transcript of Record.

California, all Federal taxes paid, and sweet wines of several types, such as port and sherry at \$6.00 per case, F.O.B. San Francisco, California, all Federal taxes paid; that shipment was to be at the rate of one car minimum each month, to commence as soon as labels were affixed to the bottles of wine, and that payment was to be made upon the presentation of a sight draft with a bill of lading and invoice attached thereto.

VII.

That on or about the 25th day of February, 1943, Serge Hermann duly assigned said contract to Park, Benziger & Co., Inc., plaintiff herein, in writing for a valuable consideration and that plaintiff ever since has been and now is the assignee of the said contract dated on or about January 29, 1943, which said contract is more particularly referred to in Paragraph VI hereof. [2]

VIII.

That at all the times since the said 25th day of February, 1943, defendants ratified the said assignment to plaintiff and said defendants have corresponded and conferred with plaintiff concerning the preparation of labels for said wine, the preparation of equipment to affix said labels, the securing of approval from Federal Alcohol Tax Administration for the label, the obtaining of official opinion regarding shipment of said wine in interstate commerce, the preparation of cartons for the packaging

of said wine and other matters relating to the shipment of the wine referred to in said contract.

IX.

That at all times prior to the said assignment to plaintiff herein on or about the 25th day of February, 1943, Serge Hermann the assignor duly performed all the conditions of the said contract dated on or about the 29th day of January, 1943, on his part to be performed, and that since said assignment and at all times, plaintiff has fully performed all conditions thereof on the part of plaintiff to be performed.

X.

That on or about the 27th day of April, 1943, the defendants informed the plaintiff that said defendants would not perform the contract and would not ship and deliver to the plaintiff at any time or at all, the wine specified in said contract dated January 29, 1943, in accordance with the terms thereof, and that the said defendants and each of them totally repudiated the said contract and each and every part thereof.

XI.

That in reliance upon said contract, plaintiff has accepted an order for shipment of 1200 cases of said wines, the profit on which totals approximately \$1800.00; that in addition thereto, in reliance upon said contract, plaintiff [3] has secured the services of an artist and contracted for the printing of labels for said wines and has expended thereon approxi-

mately \$1000.00; that an officer of the plaintiff has travelled to arrange for packaging, labeling and shipping of said wines at an expense to plaintiff of approximately \$1500.00.

XII.

That by reason of the premises, plaintiff has advertised said wines for sale and has offered the said wines to numerous of its customers and has issued a price list to them thereon and as a result of defendants' breach is seriously damaged in its reputation with said customers and with the public, and plaintiff has been hindered and delayed in its business by said breach and has lost a great deal of time and business therefrom and by reason of the premises has been deprived of gains and profits which plaintiff otherwise would have acquired had it not been injured as aforesaid, to plaintiff's damage in the sum of \$237,750.00.

XIII.

That the true names of defendants sued herein as First Doe and Second Doe are not known to plaintiff, and plaintiff prays leave to amend this complaint by inserting herein the true names of said defendants together with appropriate allegations charging the same upon plaintiff's determining the true names of said defendants.

Wherefore plaintiff prays judgment against defendants and each of them in the sum of \$4300.00 as and for special damages and in the sum of \$237,-

750.00 as and for general damages, totalling \$242,-050.00 plus interest thereon, costs of suit incurred therein and for such other and further relief as to the Court may seem proper in the premises.

ALFRED E. BRESLAUER
Attorney for Plaintiff
111 Sutter St.
San Francisco, Calif. [4]

State of California, City and County of San Francisco—ss.

Philip Elman, being first duly sworn, deposes and says: That he is the vice-president of Park, Benziger & Co., Inc., a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said corporation that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

PHILLIP ELMAN

Subscribed and sworn to before me this 8th day of May, 1943.

BERTHA RIESE ADLER

Notary Public in and for the City and County of San Francisco, State of California

My Commission expires Sep. 11-1946 (Seal of the Notary)

[Endorsed]: Filed May 19, 1944. Walter B. Maling, Clerk. [5]

[Title of District Court and Cause.]

ANSWER

Now comes the defendants, Peter Bercut (sued herein as Pierre Bercut) and Jean Bercut, individually and as co-partners, doing business as P & J Cellars, a co-partnership, and answering the complaint on file herein, admit, deny and allege as follows:

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs I, II, III and V of said complaint and basing their denials on that ground deny generally and specifically, each and every, all and singular, the said allegations.

II.

Defendants deny generally and specifically, each and every, all and singular, the allegations of paragraphs VI, VIII, VIII, IX and X of said complaint. [6]

III.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs XI, XII and XIII of said complaint and basing their denials on that ground, deny generally and specifically, each and every, all and singular the said allegations.

IV.

Defendants deny that plaintiff has been damaged in any sum, or in any amount, or at all, by reason of the matters or things set forth in said complaint.

As and for a separate, further and special defense herein, these answering defendants allege that the complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, these answering defendants pray that the complaint on file herein be dismissed; that defendants be given judgment for their costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

Dated: June 8th, 1943.

LOUIS H. BROWNSTONE

Attorney for Defendants, Peter Bercut and Jean Bercut, individually and as co-partners, doing business as P & J Cellars.

(Admission of Receipt of Copy)

[Endorsed]: Filed Jun. 8, 1943. Walter B. Maling, Clerk. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Now comes plaintiff and complains of defendants, and for cause of action against them alleges:

I.

That this court has jurisdiction over this action because of the diversity of citizenship of the parties hereto.

II.

That at all the times herein mentioned plaintiff, Park, Benziger & Co., Inc., was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, and authorized thereby to carry on the business of buying and selling wines at wholesale, with its principal place of business at No. 24 State Street, in the City of New York, State of New York, and plaintiff is a resident and citizen of the State of New York.

III.

That at all the times herein mentioned, Louise Hermann, doing business as Chateau Montelena of New York, was and now is a resident and citizen of the State of New York, and Serge Hermann, agent of said Chateau Montelena of New York, was and now is a resident and citizen of the State of New York.

IV.

That at all times herein mentioned, defendants Pierre Bercut and Jean Bercut, individually and as co-partners doing business as P & J Cellars, First Doe and Second Doe, and each of them, was and now is a resident and citizen of the City and County of San Francisco, State of California.

V.

That the matter in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and costs. [8]

VI.

That on or about the 29th day of January, 1943, at the City and County of San Francisco, State of California, defendants entered into a written agreement with Chateau Montelena of New York, represented by Serge Hermann, its duly authorized agent, a copy of which agreement is hereto attached marked Exhibit "A" and made a part hereof by reference and which said agreement was modified by a letter dated February 3, 1943, a copy of which said letter is hereto attached marked Exhibit "B" and made a part hereof by reference.

VII.

That on or about the 25th day of February, 1943 Chateau Montelena of New York duly assigned said contract to Park, Benziger & Co., Inc., plaintiff herein, in writing for a valuable consideration, and that plaintiff ever since has been and now is the assignee of the said contract dated on or about January 29, 1943, which said contract is more particularly referred to in Paragraph VI hereof.

VIII.

That at all the times since the said 25th day of February, 1943, defendants ratified the said assignment to plaintiff and said defendants have corresponded and conferred with plaintiff concerning the preparation of labels for said wine, the preparation of equipment to affix said labels, the securing of approval from Federal Alcohol Tax Administration for the label, the obtaining of official opinion regarding shipment of said wine in interstate commerce, the preparation of cartons for the packaging of said wine, and other matters relating to the shipment of the wine referred to in said contract.

IX.

That at all times prior to the said assignment to plaintiff herein on or about the 25th day of February, [9] 1943, Chateau Montelena of New York, the assignor, duly performed all the conditions of the said contract dated on or about the 29th day of January, 1943, on its part to be performed, and that since said assignment and at all times plaintiff has fully performed all conditions thereof on the part of plaintiff to be performed.

X.

That on or about the 27th day of April, 1943, the defendants informed the plaintiff that said defendants would not perform the contract and would not ship and deliver to the plaintiff at any time or at all, the wine specified in said contract dated Janu-

ary 29, 1943, in accordance with the terms thereof, and that the said defendants and each of them totally repudiated the said contract and each and every part thereof.

XI.

That in reliance upon said contract, plaintiff has accepted an order for shipment of 1200 cases of said wines, the profit on which totals approximately \$1,800.00; that in addition thereto, in reliance upon said contract, plaintiff has secured the services of an artist and contracted for the printing of labels for said wines and has expended thereon approximately \$1,000.00; that an officer of the plaintiff has traveled to arrange for packaging, labeling and shipping of said wines at an expense to plaintiff of approximately \$1,500.00.

XII.

That by reason of the premises, plaintiff has advertised said wines for sale and has offered the said wines to numerous of its customers and has issued a price list to them thereon, and as a result of defendants' breach is seriously damaged in its reputation with said customers and with the public, and plaintiff has been hindered and delayed in its business by said breach and has lost a great deal of time and business [10] therefrom, and by reason of the premises has been deprived of gains and profits which plaintiff otherwise would have acquired had it not been injured as aforesaid, to plaintiff's damage in the sum of \$237,750.00.

XIII.

That the true names of defendants sued herein as First Doe and Second Doe are not known to plaintiff, and plaintiff prays leave to amend this complaint by inserting herein the true names of said defendants together with appropriate allegations charging the same, upon plaintiff's determining the true names of said derendants.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$4,300.00 as and for special damages, and in the sum of \$237,750.00 as and for general damages, totaling \$242,050.00, plus interest thereon, costs of suit incurred herein, and for such other and further relief as to the Court may seem proper in the premises.

ALFRED F. BRESLAUER
Attorney for Plaintiff
111 Sutter Street, Suite 1333
San Francisco 4, California

[11]

State of California, City and County of San Francisco—ss.

Alfred F. Breslauer, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on informa-

tion and belief, and that as to those matters he believes it to be true.

That affiant makes this verification in the place and stead of plaintiff in said action for the reason that the officers of plaintiff are absent from the City and County of San Francisco, State of California, where affiant has his office.

ALFRED F. BRESLAUER

Subscribed and sworn to before me this 26th day of July, 1943.

OLIVER LEUENBURG

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Jan. 3, 1947. [Seal of Notary]

(Acknowledgment of receipt of copy) [12]

EXHIBIT "A" AGREEMENT

This Agreement entered into this 29th day of January, 1943 by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge

Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York party of the second part.

Witnesseth:

Whereas the party of the first part is the owner of certain stocks of wine of various kinds and vintage and

Whereas the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

Now, Therefore in consideration of the mutual promises and covenants herein contained, and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid, receipt of which is hereby acknowledged it is mutually agreed as follows:

First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under terms and conditions to be mutually agreed upon.

Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of [13] February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for holidays a maximum of two cars may be

shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy7,	167 cases of 12 bottles of fifths per case
Claret	145 cases of 12 bottles of fifths per case
Rhine Wine6,	587 cases of 12 bottles of fifths per case
Sauterne4,	095 cases of 12 bottles of fifths per case
Sherry	834 cases of 12 bottles of fifths per case
Port	763 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agreed upon to be paid to the first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basic of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled, is to be paid for proportionately between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945. [14]

Fourth: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

Fifth: That the manner of payment shall be by sight draft with Bill of Lading attached F.O.B. San Francisco, California drawn on second party for each shipment by car or steamer as the case may be.

Sixth: The party of the first part herewith stipulates that all taxes of any description levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date hereof, by the Federal, State, Municipal or any other constituted authority.

Seventh: The party of the first part shall assume all storage charges on the stocks remaining

unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part is is clearly understood that the terms hereof shall be inoperative.

Eighth: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by the party of the first part with the inscription placed [15] thereon "Selected by Bercut Freres", and the party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of the first part harmless from any and all controversies that may arise.

Ninth: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party

of the first part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

Tenth: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

Eleventh: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict on interpretation respecting any of the provisions herein it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of competent jurisdiction in San Francisco, California. [16]

In Witness Whereof the parties hereto have set their hands this 29th day of January 1943.

P & J CELLARS
By PETER BERCUT
First Party

CHATEAU MONTELENA
OF NEW YORK
By SERGE HERMANN
Second Party [17]

EXHIBIT "B"

San Francisco, California, February 3, 1943.

Chateau Montelena of New York, 48 West 48th Street, New York City, N. Y.

Attention: Mr. Serge Hermann

Gentlemen:

With reference to our agreement executed on the 29th day of January 1943 the following revisions or additions are herewith made, said additional data to be included and to form part and parcel of the original agreement:

- 1. That the quantities stipulated as bottled as of this date are to the best of our knowledge vintage wines of 1937 and 1938.
- 2. That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be excercised by both parties in order to commence at least 60 days hence.
- 3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without change and in full force and effect.

Very truly yours,
P & J CELLARS
By PETER BERCUT

WGE:HF

[Endorsed]: Filed Aug. 6, 1943. [18]

[Title of District Court and Cause.] ANSWER TO AMENDED COMPLAINT

Now comes the defendants, Peter Bercut (sued herein as Pierre Bercut) and Jean Bercut, individually and as co-partners, doing business as P & J Cellars, a co-partnership, and answering the amended complaint on file herein, admit, deny and allege as follows:

First Defense

I.

Defendants are without knowledge or information, sufficient to form a belief as to the truth of the averments contained in paragraphs I, II, III, V and VII of said amended complaint.

II.

Defendants admit the execution of that certain agreement referred to in paragraph VI of said amended complaint, a copy of which is attached to said amended complaint and marked Exhibit A,

and admit the execution of the letter dated February 3, 1943, a copy of which is attached to said amended complaint and marked Exhibit B.

III.

Defendants deny generally and specifically, each and every, all and singular, the averments of paragraphs VIII, IX and X, of said amended complaint.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs XI, XII and XIII of said amended complaint.

V.

Defendants deny that plaintiff has been damaged in any sum, or in any amount, or at all, by reason of the matters or things set forth in said amended complaint. [19]

Second Defense

The amended complaint on file herein fails to state a claim upon which relief can be granted.

Third Defense

Subsequent to the execution of the agreement attached to the amended complaint, marked Exhibit A, and of the letter modifying said agreement, marked Exhibit B, and on or about the 27th day of April, 1943, the said agreement, as modified, was terminated by mutual abandonment.

Fourth Defense

Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the ability to perform the terms, provisions and conditions of the said agreement marked Exhibit A, as modified by the letter marked Exhibit B, required to be performed therein by Chateau Montelena of New York.

Fifth Defense

Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the legal right to enter into and perform, or enter into or perform the said agreement marked Exhibit A, as modified by the letter marked Exhibit B.

Wherefore, these answering defendants pray that the amended complaint on file herein be dismissed; that defendants be given judgment for their costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

LOUIS H. BROWNSTONE

Attorney for Defendants, Peter Bercut and Jean Bercut, individually and as co-partners, doing business as P & J Cellars.

(Acknowledgment of receipt of copy)

[Endorsed]: Filed Aug. 12, 1943. [20]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED INSTRUCTIONS

[21]

[Title of District Court and Cause.]

FURTHER INSTRUCTIONS REQUESTED BY PLAINTIFF ON SECOND TRIAL

[22]

Plaintiff's Instruction No. 1

This is an action between Park Benziger & Co. Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The Plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendant's contract to sell and deliver 60,000 cases of wine.

Given ST. SURE, D J [23]

Plaintiff's Instruction No. 1-A

(If Instruction No. 1 is not given as is, respecting number of cases, plaintiff proposes the following alternative instruction:)

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff and Pierre and Jean

Bercut doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver one car load a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.

Refused A. F. ST. SURE, D J [24]

Plaintiff's Instruction No. 2

The Court instructs you that the contract between Chateau Montelena of New York and the defendants, dated January 29, 1943, and modified by letter dated February 3, 1943, was a contract for the sale of merchandise in the ordinary course of business, the assignment thereof was not prohibited by statute nor by the contract itself, and that said contract was assignable.

Meyer v. Washington Times, 76 Fed. 2nd 988 La Rue v. Groezinger, 84 Cal. 281

Given ST. SURE, D J [25]

Plaintiff's Instruction No. 3

The Court instructs you that the assignment of a contract transfers to the assignee all of the right and title of the assignor in the contract, and the assignee is thereupon entitled to the performance of said contract.

You are instructed that the Chateau Montelena of New York assigned the contract dated January 29, 1943 between Chateau Montelena of New York and Pierre Bercut and Jean Bercut doing business as P & J Cellars, to the plaintiff, Park Benziger & Co., Inc., and that Park Benziger & Co. Inc., the plaintiff, was thereafter entitled to receive performance of the contract from the defendants.

Silva v. Providence Hospital of Oakland, 14 Cal. (2d) 762

Jones v. Albert, 161 Cal. 234

Given ST. SURE, D J [26]

Plaintiff's Instruction No. 4

You are instructed that after the contract in this case was executed between defendants, Pierre Bercut and Jean Bercut, doing business as P & J Cellars, on the one hand, and Chateau Montelena of New York on the other, the latter assigned its entire interest under said contract to the plaintiff herein, namely, Park Benziger & Co., Inc. It has been stipulated that defendants received notice of this assignment. You are instructed that after the defendants Pierre and Jean Bercut received notice

of this assignment no act or omission of the assignor could justify repudiation of the contract which from and after the date of the assignment was with plaintiff Park Benziger & Co., Inc.

Refused A. F. ST. SURE, D J [27]

Plaintiff's Instruction No. 5

You are instructed that Chateau Montelena of New York is not a party to this case. That any possible agreement which may have been referred to in the evidence under which plaintiff, after it took the assignment of the contract, may have agreed to pay part of its profits under said contract, to Chateau Montelena of New York, does not touch any issues in this case nor do the relations between plaintiff and Chateau Montelena of New York subsequent to the assignment of contract of plaintiff enter into this case; and you are to decide this case solely as between the plaintiff and defendants.

> Russ v. Tuttle, 158 Cal. 226 Concordia Fire Ins. Co. v. Commercial Bank, 39 Fed. 2nd 826

Refused A. F. ST. SURE, D J [28]

Plaintiff's Instruction No. 5-A

You are instructed that Park-Benziger Co. Inc., a corporation, has no power to enter into a partner-ship with another person or corporation.

You are instructed that there was no partnership

between plaintiff Park-Benziger & Co. Inc., and Serge Hermann, or any one else.

New York General Corporation Law, Sec. 13, 14

6 Fletcher Cyclopaedia Corporation (Perm. Ed.) pp. 243-4 Sec. 2520

Refused ST. SURE, D J [29]

Plaintiff's Instruction No. 5-B

To constitute a joint adventure, there must at least be (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties.

Beck v. Cagle 46, Cal. App. 2nd 152, 161 Given ST. SURE, D J [30]

Plaintiff's Instruction No. 5-C

Transactions which one joint adventurer makes on his own behalf alone do not bind the other joint adventurers.

Given ST. SURE, D J [31]

Plaintiff's Instruction No. 5-D

Your are instructed that even though a joint-adventurer may abandon the enterprise for himself

he cannot abandon it for his co-adventurers without their consent.

30 Amer. Jurs. 702.Goss v. Lanan, 152 N.W. 43, 46 IowaZeibak v. Masser, 12 Cal. 2nd 1, 13

Refused A. F. ST. SURE, D J [32]

Plaintiff's Instruction No. 5-E

If by its terms the obligations of a written contract are expressly made binding upon successors and assigns of the parties thereto, no express assumption of those obligations by an assignee thereof is necessary.

3 Cal. Jur. 291 Brady v. Fowler, 45 Cal. App. 592, 595 Given ST. SURE, D J [33]

Plaintiff's Instruction No. 5-F

You are instructed that the law does not require an assignment to be in any particular form.

Given ST. SURE, D J [34]

Plaintiff's Instruction No. 6

The Court instructs you that when the assignor of a contract has performed or offered to perform all the requirements of said contract imposed upon him prior to the assignment, and that thereafter the assignee has performed or offered to perform all the requirements of said contract imposed upon him,

the assignee is entitled to performance of the contract from the other party.

If you find that the assignor Chateau Montelena of New York performed or offered to perform all the requirements of the contract of January 29, 1943, on its part prior to the assignment thereof, and that after said assignment, the plaintiff, Park Benziger & Co., Inc., performed or offered to perform on its part all the requirements of the contract dated January 29, 1943, you should find that the said plaintiff was entitled to performance from the defendants.

Civil Code, Section 1439

Given ST. SURE, D J [35]

Plaintiff's Instruction No. 7

You are instructed that if you find that the defendants repudiated their contract with plaintiff either by telling plaintiff that they would not perform or by acts inconsistent with defendants' continued performance of their obligations under the contract, then the plaintiff may sue immediately for breach of the contract.

Given ST. SURE, D J [36]

Plaintiff's Instruction No. 8

You are instructed that an offer of substantially different terms from those in the contract between the parties, stated with the intention not to perform the original contract, constitutes a repudiation of the contract by the party making said offer.

If you find that the defendants offered to plaintiff "three cars for cash" and other cars to be decided upon later, if at all, with the intention not to proceed with the original contract, you will find that the defendants repudiated and breached their contract with the plaintiff.

Given ST. SURE, D J [37]

Plaintiff's Instruction No. 9

The Court instructs you that when one party to a contract notifies the other party that he will not perform the obligations of the contract, this repudiation excuses further performance by the other party.

If you find that on or about the 27th day of April, 1943, the defendants repudiated the contract of January 29, 1943, and refused to perform said contract, you should find that the plaintiff was excused from further performance.

Civil Code, Section 1440.

Given ST. SURE, DJ [38]

Plaintiff's Instruction No. 10

You are instructed that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been

offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

3 Williston Rev. Ed. p. 2475

Given ST. SURE, D J [39]

Plaintiff's Instruction No. 11

You are instructed that defendants herein claim that the contract involved in this case was abandoned by mutual consent of the defendants and the plaintiff. You are instructed that abandonment is an affirmative defense and that the burden of proving the same by a preponderance of evidence rests upon the defendants.

If you do not find that the defendants have proved abandonment by the plaintiff by a preponderance of evidence or if you find that upon the issue of abandonment, the scales of proof hang even, then I instruct you to find against the defendants upon the issue of abandonment.

Given as modified ST. SURE, D J [40]

Plaintiff's Instruction No. 12

The defendants have alleged a termination of the contract by mutual abandonment. To constitute an abandonment of a contract there must exist on the part of all parties concerned an actual intent to abandon together with unequivocal, positive acts inconsistent with continued performance of the contract,

If you find that there was no actual intent on the part of the plaintiff Park Benziger & Co., Inc., to abandon said contract of January 29, 1943, then you should find against the defendants on the alleged defense of mutual abandonment.

Utley v. Donaldson, 94 U. S. 29

City of Del Rio v. Ulen Contracting Co., 94 Fed. 2nd 701

Peterson v. Wagner, 52 Cal. App. 1

Given ST. SURE, D J [41]

Plaintiff's Instruction No. 13

If you find that defendants Pierre Bercut and Jean Bercut, doing business as P & J Cellars, deliberately chose to take the written contract of Chateau Montelena shown on Defendants' Exhibit A, and not the written contract of two parties, then you are instructed that you must disregard all evidence tending to show that the instrument may have been intended to include any person other than the persons named therein.

Pac. Ready Cut Houses Inc. vs. Seober, 205 Cal. 690, 696

Ferguson v. McBean, 91 Cal. 63, 72

Refused A. F. ST. SURE, D J [42]

Plaintiff's Instruction No. 14

You are instructed that the agreement of April 27, 1943 (Def. Exhibit A), shows on its face that

Serge Hermann signed it on behalf of Chateau Montelena of New York. You are instructed that the contents of the document are conclusive and that it cannot be shown by oral evidence that Hermann signed on behalf of any one else.

Refused A. F. ST. SURE, D J [43]

Plaintiff's Instruction No. 15

The Court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 60,000 cases of wine, and you find that said profit could reasonably have been expected, and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding \$237,750.00 as and for general damages.

Shoemaker v. Acker, 116 Cal. 239 Stephany v. Hunt Bros. Co., 62 Cal. App. 638 Robinson v. Rispin, 33 Cal. App. 536 Caspary v. Moore, 21 Cal. App. (2) 694.

Given as modified ST. SURE, D J [44]

Plaintiff's Instruction No. 15-A

(If instruction No. 15 is not given in the form requested as to the number of cases then the following instruction:)

The Court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on the wine which the defendants agreed to ship in the years 1943 and 1944, and you find that said profit could reasonably have been expected and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff you will find general damages for the plaintiff in an amount not exceeding \$237,750.00.

Refused ST. SURE, D J [45]

Plaintiff's Instruction No. 16

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff is entitled to the difference between the contract price and the market price for 60,000 cases of wine as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00, as and for general damages, the amount prayed for in the complaint.

U. S. Trading Co. v. Newmark, 56 Cal. App. 176, 191

Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567

California Civil Code, section 3300

Cal. Civ. Code Sec. 1787

Monaghan v. Alexander, 76 Utah 81, 287 Pac. 908 (Sales Act.)

Schopflocher v. Zimmerman, 240 N. Y. 507, 148 N. E. 660 (Sales Act, Cardozo, J.)

Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97 (Sales Act.)

Refused A. F. ST. SURE, D J [46]

Plaintiff's Instruction No. 16-A

(If Instruction No. 16 is not given in the form requested as to the number of cases, then the following instruction:)

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said

goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market then the plaintiff is entitled to the difference between the contract price and the market price for the number of cases which defendants agreed to deliver during the years 1943 and 1944 as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00 as and for general damages the amount prayed for in the complaint.

Refused ST. SURE, D J [47]

Plaintiff's Instruction No. 17

You are instructed that the jury in its discretion may award special damages arising from the breach of contract.

If you find for the plaintiff and you find that plaintiff has suffered special damages in the expenses incurred in reliance and performance of said contract, in failure to perform a contract for delivery of 1200 cases of wine specified in said contract, in hiring an artist to prepare labels and in manufacturing said labels, in trips of executives of said plaintiff from New York to California to arrange for shipments of the goods in reliance upon said contract, your verdict should be for the plaintiff in

the sum of not to exceed \$4300.00 as and for special damages.

Cole v. Swanston, 1 Cal. 51Terrace Water Co. v. San Antonio Light and Power Co., Cal. App. 511

Refused ST. SURE, D J

[Endorsed]: Filed Mar. 22, 1944. [48]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFENDANTS [49]

Defense Request No. 1

The evidence shows that "Chateau Montelena of New York" was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Chateau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both.

Given ST. SURE, D. J. [50]

Defense Request No. 2

The defendants Bercut admit that they did not deliver any of the wine mentioned in the contract, and they defend on the ground that the contract was cancelled or terminated by mutual abandonment on April 27, 1943.

Given ST. SURE, D. J. [51]

Defense Request No. 3

A contract can be mutually abandoned by the parties before performance begins or at any stage of their performance and each of the parties released from any further obligation on account of such contract. The contract may be abandoned by a written agreement or an oral agreement, or an agreement or understanding partly in writing and partly oral. The fact of such abandonment can be established by evidence of the acts and declarations of the parties. If you find that on or about the 26th and 27th days of April, 1943, Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract, Plaintiff's Exhibit No. 2, then, and in such event, your verdict should be for the defendants.

Tompkins x. Davidow, 27 Cal. App. 327, 335, 149 Pac. 789, 791, col. 2;

Guidery v. Green, 95 Cal. 630, 634, 30 Pac. 786;

Jones, Evidence, §442;

Bradley v. Bush, 11 Cal. App. 287, 293, 104 Pac. 845, 847, col. 2; Morrow v. Coast Land Co., 29 C.A. 2d 92, 106-107, 84 Pac. 2d 301, 309, and cases there cited;

6 Cal. Jur. 382, §230.

Given ST. SURE, D J [52]

Defense Request No. 4

The inference of abandonment may arise either from a single act or from a series of acts. The question is whether there was an abandonment, not whether it is evidenced by one act or by many.

> Morrow v. Coast Land Co., 29 C.A. 2d 92, 106-107, 84 Pac. 2d 301, 309.

Given ST. SURE, D J [53]

Defense Request No. 5

When a contract has been once mutually abandoned, it cannot thereafter be revived or restored to life by one of the parties alone because he changes his mind, even though the change of mind may occur in the next minute or hour or day after the mutual abandonment occurred. If you find from the evidence that the contract of January 29, 1943, was mutually abandoned at the moment that Serge Hermann signed and delivered the paper of April 27, 1943, then I instruct you that the contract could not be thereafter revived or restored to life without the assent or consent of the Bercuts, and the evidence shows that the Bercuts never assented or consented to revival or restoration of the contract.

Given ST. SURE, D J [54]

Defense Request No. 6

The evidence shows that the paper of April 27, 1943, was signed only by Serge Hermann. You must therefore consider and determine the relationship between Serge Hermann and the plaintiff Park, Benziger & Co.

Given ST. SURE, D J [55]

Defense Request No. 7

The plaintiff Park, Benziger & Co. claims that Serge Hermann was merely employed by it as an employee or salesman working on a commission of 50% of net profits. The defendants Bercut claim that Park, Benziger & Co. and Serge Hermann were either partners or joint adventurers in the matter of the Bercut wine. If, as plaintiff claims, Serge Hermann was merely an employe or salesman, then Park, Benziger & Co. would not be bound by Hermann's act in signing the paper of April 27. However, if as the defendants Bercut claim, Hermann was either a partner of, or joint adventurer with, Park, Benziger & Co. in the matter of the Bercut wine, then you could infer from the whole of the evidence that Park, Benziger & Co. were bound by the act of Hermann in signing the paper of April 27.

Given ST. SURE, D J [56]

Defense Request No. 8

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Calif. Civil Code, \$2400(1).

Given ST. SURE, D J [57]

Defense Request No. 9

A joint adventure is something like a partnership but is not identical with it. A joint adventure is an association of two or more persons or corporations to carry out a single business enterprise for profit. It is usually although not necessarily limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years. The name "joint adventurer" is applied of those special combinations of two or more persons or corporations, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

Elliott v. Murphy Timber Co., 117 Or. 387, 244 Pac. 91, 48 A.L.R. 1043, 1047;

33 C. J. 842;

Andrews v. Bush, 109 Cal. App. 511, 517-518, 293 Pac. 152, 154;

14 Cal. Jur. 760, §2.

Given ST. SURE, D J [58]

Defense Request No. 10

In considering whether or not a relationship such as that of joint adventurers or partners has been created, the law is guided in part by the acts of the parties, and is not limited to their spoken or written words.

Andrews v. Bush, 109 Cal. App. 511, 517-518, 293 Pac. 152, 154.

Given St. SURE, D J [59]

Defense Request No. 11

In determining whether or not there was a joint adventure, you shall not fasten your attention upon any one paper or any one term of a paper or any one act alone to the exclusion of everything else. You should consider the whole scope of the arrangement and each part of it should be considered in relation to all other parts. Look at the arrangement as a whole.

Rosenblum v. Springfield Produce Brokerage Co., (Mass.) 137 N.E. 357, 360, col. 1; Simpson v. Richmond Worsted Spinning Co., (Me.) 145 Atl. 250, 254, col. 1; San Francisco Iron & Metal Co. v. American M. & I. Co., 115 Cal. App. 238, 245-247, 1 Pac.2d 1008, 1011.

Given ST. SURE, D J [60]

Defense Request No. 12

I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there

was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says that the acts and conduct of parties may speak above their expressed declarations to the contrary.

O.K. Boiler and Welding Co. v. Minnetonka Lumber Co., (Okl.) 299 Pac. 1045, 1017-1018, approved in Universal Sales Corp. v. California Press Mfg. Co., 20 C.2d 751, 128 Pac.2d 665, 673-4.

Given ST. Sure, D J [61]

Defense Request No. 13

The use of the word "commission" in the paper of February 25, 1943, between Serge Hermann and Park, Benziger & Co. is of no importance. In the business world the words "commissions" and "profits" are often used as synonyms, and in any event the arrangement between them is not determined or controlled by any one word.

Van Tine c. Hilands, 131 Fed. 124, 127.

Refused A. F. ST. SURE, D J [62]

Defense Request No. 14

Of course, the wages or compensation of a mere employe or salesman may be measured by a percentage of the profits of a business, but in determining whether there was a joint adventure it is important to inquire whether the person who renders or is to

¹Spier v. Lang, 4 Cal.2d 711, 53 Pac.2d 138;

render the services is himself the promoter or an original party to the enterprise. The evidence at bar shows that Serge Hermann was the promoter of the whole enterprise, and the original party to it, and you are therefore at liberty to infer that he was a joint adventurer² rather than a mere employe or salesman.

Given ST. Sure, D J [63]

²33 C. J. 844, §9;

Dexter & Carpenter v. Houston, 4 Cir., 20 F.2d 647.

Defense Request No. 15

Speaking generally, a partner or a joint adventurer contributes capital to the enterprise, something promotive to the enterprise. However, in the case of a joint adventure the contributions need not be the same in kind. It is sufficient if the contribution of one consists of time, energy, skill or experience, and it is sufficient in this respect if you find that Serge Hermann contributed his own time, energy, skill and experience in travelling from New York to California to look for wine, and subsequently to arrange for shipment, and was to have used his own time and energy, at his own expense,

¹Universal Sales Corp. v. Calif. Press Mfg. Co., 20 Cal.2d 751, 764, 128 P.2d 665, 673, col. 2.

²Simpson v. Richmond Worsted Spinning Co., 145 Atl. 250, 254, col. 1.

in finding buyers for the wine from Park, Benziger & Co.

Botsford v. Van Riper, 33 Nev. 156, 110 Pac. 705, 711;

Elliott v. Murphy Timber Co., 48 A.L.R. 1043, 1047;

Motter v. Smyth, 10 Cir., 77 F.2d 77, 79.

Refused A. F. ST. SURE, D J [64]

Defense Request No. 16

It is generally said that there must be a sharing of losses as well as profits as a test of a partnership or joint adventure. However, in the case of a joint adventure, the sharing of losses does not mean that each must bear the same kind of loss. One may lose money capital and the other may lose time and expenses. The evidence in this case shows that Serge Hermann travelled between New York and San Francisco a couple of times on his own time and at his own expense, and that that would have been his personal loss if no net profits were made. I therefore instruct you that that would be a sufficient sharing of loss to satisfy this branch of the question whether he was a joint adventurer instead of a mere employe or salesman on commission.

Shoemake v. Davis, (Kan.) 73 Pac.2d 1043, 1045, col. 1;

Rae v. Cameron, (Mont.) 114 P.2d 1060, 1065, col. 1, quoting 30 Am. Jur. 682, §12.

Refused A. F. ST. SURE, D J [65]

Defense Request No. 17

The cancellation or termination writing or paper of April 27, 1943, is signed by defendants Bercut and by Serge Hermann for Chateau Montelena of New York, the same parties who were the parties to the original contract of January 29, 1943. If you find from the evidence that on April 27, 1943, when the writing or paper of that date was signed Serge Hermann was a partner or joint adventurer of or with the plaintiff Park, Benziger & Co., then I instruct you that under the circumstances of this case the plaintiff was bound by Serge Hermann's act and signature in signing on April 27, 1943, and your verdict should accordingly be in favor of defendants Bercut.

Bond v. O'Donnell, 63 A.L.R. 901, at 907; Mahony v. Boenning, (Pa.) 6 Atl.2d 795; Manatee Loan & Mortgage Co. v. Manley's Estate, 106 Vt. 356, 175 Atl. 14, 17; Mid-Columbia Production Credit Assn. v. Smeed, (Or.) 136 Pac.2d 255.

Given ST. SURE, D J [66]

Defense Request No. 18

Each one of two or more joint adventurers has power to bind the others in matters within the scope of the joint enterprise, in dealings with third persons, and regardless of any limitations on authority that may have been agreed between the joint adventurers, if the third person is unaware of the limitation of authority at the time of acting.

Manatee Loan & Mortgage Co. v. Manley's
Estate, 106 Vt. 356, 175 Atl. 14, 17.

Given ST. SURE, D J [67]

Defense Request No. 19

If you find that there was no partnership or joint adventure between Serge Hermann or Chateau Montelena of New York and plaintiff, but if you nevertheless find that Phillip Elman, Vice President of plaintiff, stated and represented to defendants on or about April 26th or April 27th, 1943, that such a partnership or joint adventure did exist, then, and in such event, plaintiff is bound by the termination agreement dated April 27, 1943, and your verdict should accordingly be for the defendants.

Withdrawn by Mr. Naus. [68]

Defense Request No. 20

Now, with respect to the occurrences on April 26 and 27 in 1943 one of two results is true: either the original contract of January 29, 1943, was cancelled or terminated by mutual abandonment when the paper of April 27, 1943, was signed and delivered, or else it was repudiated by the defendants Bercut. If you find that there was such a termination on April 27, then your verdict must be in favor of defendants Bercut, and there is no need for you to consider anything further. If you find that instead of such termination there was a repudiation of the

original contract, then your verdict should be in favor of plaintiff Park, Benziger & Co., and accordingly you would need to consider how to measure the amount of damages suffered by it.

Given ST. SURE, D J [69]

Defense Request No. 21

I will instruct you on the subject of the measure of damages because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on measuring damages and the fact that I give them to you must not be considered as intimating any views of my own on the issues of liability or as to which party is entitled to your verdict. It is for you to determine from the evidence whether the plaintiff was bound by the agreement of termination or cancellation dated April 27, 1943. If it was, your verdict should be in favor of defendants Bercut. If plaintiff was not bound, then you will be guided by the instructions as to how to measure the amount of plaintiff's damages.

Given ST. SURE, D J [70]

Defense Request No. 22

If you find that there was a repudiation of an uncancelled contract by the Bercuts, then upon the happening of the repudiation the plaintiff had a choice: it could either wait until the due date of each monthly delivery and treat each non-delivery as a separate breach and bring suit after the

breaches had actually occurred in fact, or it could choose to treat the repudiation as an immediate and anticipatory breach as to the whole of the 26,691 cases and bring suit at once without waiting for the due dates of future monthly deliveries to arrive. By bringing the present suit as it did, the plaintiff made the latter choice, treating the repudiation as one or a single immediate breach, that is, an anticipatory breach, as to the whole of the contract of 26,691 cases, as happening all at once on the one day of April 27, 1943, and I therefore instruct you that all damages are to be measured as of that day.

Lompoc Produce & Real Estate Co. v. Browne, 41 Cal. App. 607, 183 Pac. 166; Six Companies v. Joint Highway District, 311 U.S. 180, 85 L.Ed. 114 (duty of Federal courts to follow, in diversity of citizenship cases, the ruling of an intermediate

Refused A. F. ST. SURE, D J [71]

appellate court of the State).

Defense Request No. 23

This suit being one for an alleged anticipatory breach by repudiation on April 27, 1943, your first inquiry, if you come to the question of damages, is whether as at April 27, 1943, the plaintiff could obtain from a responsible seller a substitute contract covering like wine on the identical terms, other than price, of the contract with the Bercuts, and if so at what prices? If plaintiff could obtain

¹ Roehm v. Horst, 3 Cir., 91 Fed. 345, at 348 (bottom) and 349.

such a contract as of the breach date of April 27, 1943, at prices no greater than in the Bercut contract, it would not be damaged, but if the substitute contract required higher prices, then the damages would be the amount of their excess over the prices stated in the Bercut contract, without any regard to whether the spot market² in wine was either a falling or a rising market at any time after April 27, 1943, up to date.³

Refused A. F. ST. SURE, D J [72]

² Lompoc Produce & Real Estate Co. v. Browne, 41 Cal.App. 607, at 610 (and cases there cited), 183 Pac. 166 (delivery due Nov. 1; repudiation on Oct. 18; complaint filed Oct. 25; falling market; evidence of daily market prices after Oct. 18 excluded).

³ Roehm v. Horst, supra, and s.c., on certiorari, 178 U.S. 1 at 21, 44 L.Ed. 953, 961, col. 2 (and see the statement of facts, 178 U.S. at 4, bottom, showing the proof of the "subcontracts for forward delivery" of the hops and measurement of the damages by the excess of the subcontracted prices over the prices of the breached contracts). The decisions in Roehm v. Horst are not cited as an applicable Federal rule, but as the local rule of California through adoption by citation and approval in the California case cited in note 2, next supra. The California rule is supported by the reasoning in such cases, e.g., as Samuels v. E. F. Drew & Co., 2 Cir., 292 Fed. 734, 738, point 3, and Crow & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 Pac. 999. Accord, Williams v. DeSoto Oil Co., 8 Cir., 213 Fed. 194, at 198, point 7; Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N.W. 1124; Irving Trust Co. v. Compania Mexicana, 2 Cir., 66 F.2d 390, 393, col. 2; In re Susquehanna Silk Mills, 10 F. Supp. 787, 788, point 1.

Defense Request No. 24

If a substitute contract was not immediately obtainable elsewhere by the plaintiff on the 27th day of April, 1943, then it was the duty of plaintiff to obtain one, if it was elsewhere obtainable, as quickly thereafter as was reasonably possible under the circumstances, and thereupon the damages would be the amount of the excess of the prices in such substitute contract over the prices stated in the Bercut contract.

Walter N. Kelly Co. v. Auto Body Co., 223 Mich. 613, 194 N.W. 518, 522-523.

Refused A. F. ST. SURE, D J [73]

Defense Request No. 25

If you find that a substitute contract for future deliveries was not obtainable elsewhere on April 27, 1943, or within a reasonable time thereafter, then the next question for you to consider is whether there was an available market in such wine for spot deliveries from time to time when deliveries would fall due under the Bercut contract.

Refused A. F. ST. SURE, D J [74]

Defense Request No. 26

When a buyer sues a seller of merchandise for damages for refusal to deliver the goods, the law uses one or the other, but not both, of two ways to measure the damages, depending on whether or not there is an available market for the goods in question.¹ Therefore, the first question to be considered

¹ Civil Code, §1787 (Uniform Sales Act, §67; Williston, Sales, §597);

is whether the wine was or was not available elsewhere in the market.² If available elsewhere in the nearest available³ market then the damages would be measured by the excess, if any, of the market value over the contract price. This is known as the market price, or market value, rule.

² 55 C. J. 1174, §1157, "Goods Unobtainable Elsewhere".

(The Sales Act, §67, as to measuring the buyer's damages for non-delivery of goods not obtainable elsewhere is merely declaratory of the rule in California before adoption of the Sales Act. See the following cases).

McKay v. Riley, 65 Cal. 623, 4 Pac. 667;

Rose v. Ford, 96 Cal. 152, 154, 30 Pac. 1114; National Oil Refining Co. v. Producer's Refining Co., 169 Cal. 740, 147 Pac. 963;

Western Industries Co. v. Mason, etc. Co., 56

Cal. App. 355, 205 Pac. 466; Coates v. Lake View Oil & Refining Co., 20 C.A.2d 113, 66 Pac.2d 463.

³ Williston, Sales, §599.

Refused A. F. ST. SURE, D J [75]

Defense Request No. 27

The measurement of damages under the market price or market value rule occurs only when there is in fact an available market at the time of the breach. Obviously, there must be an available market. Market price implies the existence of a market, of supply and demand, of sellers and buyers. The term

¹ Weed v. Lyons Petroleum Co., 294 Fed. 725, 734. ² Heiner v. Crosby, 3 Cir., 24 F.2d 191, 193.

"market value", as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price; individual dealings are not competent to prove it. A casual sale does not establish a market. Market price is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question.

Refused A. F. ST. SURE, D J [76]

Defense Request No. 28

I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary, it shows no available market. Accordingly, we must turn to the other rule for measuring the damages, and the rule in such case is that the measure of the buyer's damages is the loss directly and naturally resulting in the ordinary course of events from a seller's breach of contract, which rule as specifically applied to this case now before you means that, if you find there was a

³ North American Tel. Co. v. Northern Pacific Ry. Co., 8 Cir., 254 Fed. 417, 418.

⁴ Le Blume Import Co. v. Coty, 2 Cir., 293 Fed. 344, 351.

⁵ Birdsong & Co. v. Marty, 163 Wis. 516, 158 N.W. 289, 292, col. 1 (decided under Uniform Sales Act, §67).

¹ Civil Code, §1787(2).

breach, either (1) the amount of the buyer's outlay of expenses in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract.

Given ST. SURE, D J [77]

Defense Request No. 29

The amount of outlay cannot be awarded to a buyer in any case in which profits are awarded to him, for the sound reason that expenses incurred by him in his preparation for performance before he knew that the seller would not perform are simply the buyer's own expenses incurred in the hope or expectation of making profit and are included in any calculation of his profit, if any. To award a buyer the amount of both outlay and profits would amount to a "double recovery" by him, making the seller "pay twice for the same thing", which the law does not permit and which you should not do. The two heads of damage are distinct.

¹ Holt v. United Security Life Ins. & Trust Co., 76 N.J. Law 585, 72 Atl. 301, at 307, col. 2, 21 L.R.A. N.S. 691; Feldman v. Jacob Branfman & Son, (N.J.) 166

Feldman v. Jacob Branfman & Son, (N.J.) 166 Atl. 126, 128, col. 2 (under Uniform Sales Act, §67).

² Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 546, 47 L.Ed. 1171, 1174, col. 2, top.

³ U. S. v. Behan, 110 U.S. 338, 345, 28 L.Ed. 168, 170, col. 2.

Refused A. F. ST. SURE, D J [78]

Defense Request No. 30

In paragraph XI of its amended complaint the plaintiff claims that it expended \$1,000.00 for the services of an artist and a printer in preparing labels for the bottles, and \$1,500.00 for the travelling expenses of one of its officers in the course of arranging for the labelling, packaging and shipping of the wine. Such expenses are known as "outlay" and in nature are expenses incurred in preparing to perform the contract. Such outlay may be awarded to a buyer as damages if he fails to prove with reasonable certainty a loss of net profits.

Refused A. F. ST. SURE, D J [79]

Defense Request No. 31

Now, even though the law lays down the rule that in case of a seller's breach of an obligation to deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless the buyer must make proof showing that it was reasonably certain that the profits would have been made. Guesswork or conjecture or speculation cannot be used as a substitute for proof.¹

¹ Cederberg v. Robison, 100 Cal. 93, 97, 34 Pac. 625, 626, col. 1;

U. S. v. Behan, 110 U.S. 338, 28 L.Ed. 168.

² U. S. v. Behan, supra.

¹ U. S. v. Behan, 110 U. S. 338, 344, 28 L. Ed. 168, 170, col. 2.

That is not peculiar to the law of sales alone, but is applicable to all civil actions for damages for breach of contract. Not only must the plaintiff prove the breach, but he must also prove the damages by a sufficiency of evidence as distinguished from guesswork or conjecture.²

Given ST. SURE, D J [80]

Defense Request No. 32

If you find from the evidence that plaintiff Park, Benziger & Co. was embarking or starting in a new venture in the matter of California wine, that is, were seeking to launch a new enterprise, and that they have not proved to your satisfaction that they can show, as a means of measurement, past profits in substantial dealing in California wine under their label and through their past experience, if they had any, in such dealing in California wine, then I instruct you that you should not, and the law says you cannot, award them anything for supposed loss of anticipated profits, because the fact of profits to be realized from a business about to be launched can exist only on paper and while profits may be possible, losses in the enterprise are just as pos-

² Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696;

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 702-704, 252 Pac. 780, 785;

Johnson v. Hislop, 9 Cir., 272 Fed. 913, and quotations at page 915.

sible, and in either case they are nothing more than contingent probabilities, and of too uncertain a character to constitute a basis for the computation of damages for the breach.1 The rule is the same regardless of whether the plaintiff had not previously conducted the business at all, or whether an established liquor business was simply adding a new line of merchandise, such as adding a new line of California wine.2

8 Cal. Jur. 777, §38;

Central Coal & Coke Co. v. Hartman, 8 Cir., 111 Fed. 96, 98-99

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696.

California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, at 485 (and cases there cited), 221 Pac. 345, 347, 32 A.L.R. 114, 117-118 (distinguished in Natural Soda Products Co. v. Los Angeles, 23 A.C. 190, 143 Pac. 2d 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. 2d 239, 242, Col. 2.

² Thrift Wholesale Inc. v. Malkmillion Corp., 50 F. Supp. 998, and cases at 1000.

Refused A. F. ST. SURE, D J [81]

Defense Request No. 33

Not only should a jury refrain from speculating, conjecturing or guessing about net profits in the absence of evidence from which an inference of

¹ Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 702, 252 Pac. 780, 785, and cases; Note, 32 A.L.R. 120, at 153-156;

profit may be reasonably drawn with reasonable certainty, but it is equally true that a jury should not accept the guess or estimate or opinion of any witness upon the subject, even though given or stated under oath on the witness stand, when it has no better basis in proved facts. The speculations, conjectures, guesses or estimates of witnesses not based upon facts from which reasonably accurate inferences may be drawn form no better basis for a verdict than guesses or conjectures by the members of the jury themselves.

Central Coal & Coke Co. v. Hartman, 8 Cir., 111 Fed. 96, 102.

Refused A. F. ST. SURE, D J [82]

Defense Request No. 34

I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, 1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted

by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market.

Marcus & Co. v. K. L. G. Baking Co. (N. J., 1939) 3 Atl. 2d 627, 631-632 (under Sales Act, §67, i.e., Calif. Civil Code, §1787);

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171;

Williston, Contracts, §§1355-1357;

See Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N.Y. 33, 173 N.E. 913, 88 A.L.R. 1426, and note, 1439.

Refused A. F. ST. SURE, D J [83]

Defense Request No. 35

The term "profits", as I have used it in these instructions, does not mean gross profits. "Gross profits" are really not profits at all within the contemplation of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. "Net profits" are the gains from sales after deducting the expenses

of doing business, together with the interest on the capital employed. In addition to those deductions you must also deduct the 50% selling commission which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer.

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. 2d 239, 242, col. 2.

C. W. Rantoul Co. v. Claremont Paper Co., 1 Cir.,

196 Fed. 305, 309;

Detroit Fireproofing Tile Co. v. Vinton Co., 190 Mich. 275, 157 N.W. 8, 10, col. 1.

Given as modified ST. SURE, D J [84]

Defense Request No. 36

In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; and the burden of proof is on the plaintiff.

¹ Coates v. Lake View Oil & Refining Co., 20 C.A. 2d 113, 119, 66 Pac. 2d 463, 466;

² Klingman & Scoular v. Racine-Sattley Co., 149 Iowa 634, 128 N.W. 1109, 1110, col. 2 (bottom) and 1103, col. 1;

¹ Davis v. Carnegie Steel Co., 6 Cir., 244 Fed. 931, 934:

Molyneaux v. Twin Falls Canal Co., (Idaho) 94 A.L.R. 1264, 1277, 35 Pac. 2d 651, 659.

Given ST. SURE, D J [85]

Defense Request No. 37

I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility in handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments. The amount of such deduction is not fixed in any particular percentage by the law which leaves it to the good sense and wisdom of an intelligent jury.

Buchholz v. Green Bros. Co., 272 Mass. 49, 172 N.E. 101, 103, col. 1, points 5 and 6.

Refused A. F. St. SURE, D J [86]

Defense Request No. 38

Although the agreement dated January 29, 1943, purports to be for the sale of 60,000 cases of wine,

¹ Floyd and Speed v. United States, 2 Ct. Cl. 429, 441, affirmed in United States v. Speed, 8 Wall. (75 U. S.) 77, last two paragraphs (leading case)

a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be determined by future negotiations which never took place. Under such circumstances the contract must be treated as one for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine.

Given ST. SURE, D J [87]

Defense Request No. 39

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4,500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source

whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4,500 cases.

Lawrence v. Porter, 6 Cir., 63 Fed. 62, 66, and cases there cited;

Brookridge Farm v. U. S., 27 F. Supp. 909, 910-911.

Given ST. SURE, D J [88]

Defense Request No. 40

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits. The only damage to plaintiff through paying cash in advance would be limited to interest for the use of its money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plain-

¹ Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117.

tiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.²

² Warren v. Stoddart, supra;

Note, 46 A.L.R. 1192, at 1194; and California cases at 1195;

Lawrence v. Porter, 6 Cir., 63 Fed. 62.

Given ST. SURE, D J

[Endorsed]: Filed Mar. 22, 1944. [89]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy two thousand six hundred eighty seven and 50/100 (\$72687.50) Dollars.

A. L. HAMMILL

Foreman

3/22/44

[Endorsed]: Filed at 4 o'clock and 5 Min. P. M. Mar. 22, 1944. C. W. Galbreath, Clerk. By Edward A. Mitchell, Deputy Clerk. [90]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 22625-S

PARK, BENZIGER & CO., INC., a corporation, Plaintiff,

vs.

PIERRE BERCUT and JEAN BERCUT, individually and as co-partners doing business as P & J Cellars, a co-partnership, FIRST DOE and SECOND DOE,

Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on March 14, 1944, being a day in the March 1944 Term of this Court, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Alfred F. Breslauer, Esq., Mrs. Thelma Herzig, George G. Olshausen, Esq., and M. Mitchell Bourquin, Esq., appearing as attorneys for the plaintiff, and Louis H. Brownstone, Esq., and Geo. M. Naus, Esq., appearing as attorneys for the defendants, and the trial having been proceeded with on the 14th, 15th, 16th, 17th, 20th, 21st, and 22nd days of March in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to

the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy two thousand six hundred eighty seven and 50/100 Dollars (\$72,687.50). A. L. Hammill, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs; [91]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendants the sum of Seventy-two Thousand Six Hundred Eighty-seven and 50/100 Dollars (\$72,687.50), together with its costs herein expended taxed at \$422.75.

Judgment entered this 22nd day of March, 1944.

C. W. GALBREATH,

Clerk.

[Endorsed]: Filed Mar. 22, 1944. C. W. Galbreath, Clerk. [92]

[Title of District Court and Cause.]

Counsel Appearing:

For Plaintiff:

Alfred F. Breslauer, Esq., Mrs. Thelma Herzig, George G. Olshausen, Esq., M. Mitchell Bourquin, Esq.

For Defendants:

Louis H. Brownstone, Esq., George M. Naus, Esq.

Tuesday, March 14, 1944—10 A. M.

(A jury having been duly empanelled and sworn to try the cause, an adjournment was taken until Wednesday, March 15, 1944.)

Wednesday, March 15, 1944—10 A. M.

(Opening statements were made to the jury, on behalf of the plaintiff by Mr. Bourquin, and on behalf of the defendants by Mr. Naus, after which the following proceedings were had:) [95]

PHILIP ELMAN,

called for the Plaintiff; sworn.

Direct Examination

Mr. Bourquin: Q. Mr. Elman, you live in New York? A. Yes, sir.

- Q. Has that always been your home?
- A. For the past twelve years.
- Q. And you are connected with the Park, Benziger Company, are you? A. Yes, sir.
 - Q. What is that, a corporation?
 - A. It is a corporation.
- Q. What is your connection with the corporation?

 A. I am the vice president.

- Q. You are the vice president?
- A. In charge of sales and promotion.
- Q. Sales and promotion; that is the function committed to you, is it? A. Yes, sir.
- Q. How long have you been with Park, Benziger? A. Since 1939, sir.
- Q. Was that the formation of Park, Benziger, or can you tell us?
- A. No, that was not the formation of Park, Benziger. As I understand it, the formation of Park, Benziger took place in 1855.
- Q. And they have been engaged in business ever since that time? A. Yes.
 - Q. And are today? A. And are today.
- Q. You were the vice president in charge of sales and promotion at the time we are speaking of here in the statements made to the jury this morning?
 - A. I was.
- Q. What has been the nature of the business of Park, Benziger?
- A. Export-import, and we had a whiskey and wine department, [96]
 - Q. You had a whiskey and wine department?
 - A. Yes, sir.
- Q. Prior to January 1943 did your concern engage in the export and import of wines and liquors?
 - A. Yes, we did.
- Q. Let me ask you this: Were you familiar with the situation in the wine industry, and more correctly in the wine market, at the commencement of the year 1943?

 A. Yes, we were.

- Q. What was it, please?
- A. We were importing quite a lot of wines from various countries. Most of our business had been import, and due to conditions over in Europe that came about in 1940 with France, we continued to receive less and less import wines, and we were more or less becoming interested in doing a domestic wine business to fill that gap of imported wines, and so we commenced to do business with certain domestic manufacturers of wines looking to find and acquire certain agencies for good producers to sell in place of our import wines.
- Q. What was the situation in the United States and interstate in the wine industry or the wine market at the commencement of the year 1943?
- A. At that time the OPA and the freeze of grapes the previous year by the United States Government for use for raisins for the armed forces of this country created a tremendous shortage in available grapes for wine in California, which resulted in a very short crop and manufacture of grapes in the year preceding that, in 1942, so that in 1943 the condition of the wine market had become so acute there were no wines available for sale to us. We purchased small lots of wines that we were able to get, but, of course, we were interested more or less in acquiring larger amounts of wine to substantiate the amount of business that we had, because we couldn't import wines. We could find no wines on the [97] market.

- Q. Did the operations of the distillers have an influence on the market at that time?
- A. Yes, they did. In March 1942 the distillers, because of the fact that they were stopped from distilling whiskies for their own or for public consumption, but were put to the business of making alcohol for butadeine and other products that the Government needed, started to ration their merchandise, and they became interested in the acquisition and purchase of other merchandise to replace the smaller volume of whisky that they were going to release in order to protect stocks for continuity purposes to the markets, and they went into the wine business in order to purchase wines which they wanted for distillation into fruit spirits, that they could blend with their whiskies to stretch their whisky stock, because grain spirits were condemned by the Government for the purpose of manufacture of alcohol —at least, gunpowder. The grain spirits are used in glycerin to make smokeless gunpowder.
- Q. Was there any influence of their operations upon the sale and shipment of bulk wines?
- A. Oh, yes, it froze the shipment of bulk wines interstate in this respect: There was an interstate OPA ceiling set up, but not an industry ceiling, so the small producers or the producers in California—it didn't pay for them to ship bulk outside of the State of California, while this interstate condition existed. Therefore they had to hold back the bulk of their merchandise, and people like Schenley and

various other distilleries that came along bought those bulks, acquired those bulks for their own purpose, for their own distillation, and the acquiring of additional business and bulk shipment ceased to the [98] bottlers in the East entirely, so the bottlers did not get any wine out there, and they all started to flock to California to see if they could possibly find some small wineries that would be willing to sell them bulk wines that they could pick up and keep their bottling plants in the East going.

- Q. At the commencement of 1942 did your concern know Mr. George Hermann?
 - A. Yes, we did.
- Q. Had you done business with him prior to that time? A. Yes, we did.
 - Q. For about how long?
 - A. For about a year.
 - Q. What was his business at that time?
 - A. A wine broker, and wine merchant.
 - Q. Was he connected with Park, Benziger?
 - A. No, he was not.
- Q. Did you know of his trip to California in 1943, that is, know of it when he made it?
 - A. Yes, about a week before.
 - Q. Did your concern send him?
 - A. No, we did not.
 - Q. Or finance his trip?
 - A. No, we did not.
 - Q. Or commit any commission to him?
 - A. No, we did not.

- Q. Had you done business with Bercut Brothers prior to January 1943? A. No.
- Q. During January 1943 did you receive any word from Mr. Serge Hermann with respect to California wines?
- A. Yes, we received a telegram from Mr. Serge Hermann stating—

Mr. Naus: One moment. I ask for the telegram.

Mr. Bourquin: Q. Have you the telegram with you, Mr. Elman? A. I believe we have.

Mr. Naus: No objection. I do not suppose it will include the pencil marks?

Mr. Bourquin: No, it won't include the pencil marks.

Q. Is this the telegram—— [99]

Mr. Naus: I will assume it is, Mr. Bourquin.

Mr. Bourquin: May I offer it and read it in evidence?

The Court: It will be admitted.

(The telegram was marked

"PLAINTIFF'S EXHIBIT 1.")

Mr. Bourquin: It is addressed to Philip Elman, care of Park, Benziger.

"Have definitely completed the finest bottle deal dreamed of. Suggest you phone me on receipt this wire. Kindly advise Irene am well. Regards."

The Court: What is the date of that?

Mr. Bourquin: February 2, 1943.

- Q. That is the wire you refer to, Mr. Elman?
- A. That is right.
- Q. Did you following that receive a contract with Bercut Brothers for the sale and delivery of wine?

 A. Yes, we did.

Mr. Naus: I will waive the foundation. There is more than one date recorded there. There are three different dates.

Mr. Bourquin: I will forego that examination until we have uncovered that proposition.

Mr. Naus: I have no objection to the documents themselves.

Mr. Bourquin: Q. Mr. Elman, when was it that you received the contract of Bercut Brothers—about when? A. About February 15.

- Q. From whom, please?
- A. Mr. Serge Hermann.
- Q. At what place?
- A. At our office in New York.
- Q. At that time did you transact any business with relation to that with Mr. Hermann?
- A. Yes, we did. We purchased the contract from them and gave them a good deal on it.

Mr. Bourquin: I will ask the Court at this time that this contract, together with the instruments attached, which include [100] the supplemental agreement of February 3, 1943, and the assignment dated February 25, 1943, be admitted in evidence and marked as Plaintiff's Exhibit 2.

The Court: I understand there is no objection.

Mr. Naus: No objection to the contract itself. The witness has not yet touched on the events of February 25. I suppose Mr. Bourquin will touch on them. If he doesn't I will.

Mr. Bourquin: Yes, I will, your Honor.

The Court: That will be Exhibit 2.

(The documents were marked "Plaintiff's Exhibit 2.")

Mr. Bourquin: May I read this document to the jury?

The Court: You may if you wish.

Mr. Bourquin: I think I would like to read some of it, with counsel to pick out any parts that he thinks pertinent that I do not call attention to now.

PLAINTIFF'S EXHIBIT 2

"AGREEMENT

"This Agreement entered into this 29th day of January 1943 by and between Pierre Bercut and Jean Bercut, doing business as a copartnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough

of Manhattan, City and State of New York party of the second part.

Witnesseth:

Whereas the party of the first part is the owner of [101] certain stocks of wines of various kinds and vintage and

Whereas the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

Now, Therefore, in consideration of the mutual promises and covenants herein contained, and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid, receipt of which is hereby acknowledged it is mutually agreed as follows:

First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under the terms and conditions to be mutually agreed upon.

Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holi-

days a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy7,1	67 cases of 12 bottles of fifths per case
Claret7,1	45 cases of 12 bottles of fifths per case
Rhine Wine6,5	87 cases of 12 bottles of fifths per case
Sauterne4,0	95 cases of 12 bottles of fifths per case
Sherry 8	34 cases of 12 bottles of fifths per case
Port 8	63 cases of 12 bottles of fifths per case
	Γ1021

and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been

bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.

Fourth: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded [103] to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

Fifth: That the manner of payment shall be by sight draft with Bill of Lading attached F.O.B. San Francisco, California drawn on second party for each shipment by car or steamer as the case may be.

Sixth: The party of the first part herewith stipulates that all taxes of any description

levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date hereof, by the Federal, State, Municipal or any other constituted authority.

Seventh: The party of the first part shall assume all storage charges on the stocks remaining unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part it is clearly understood that the terms hereof shall be inoperative.

Eight: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by party of the first part with the inscription placed thereon 'Selected by Bercut Freres', and the [104] party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of first part harmless from any and all controversies that may arise.

Ninth: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party of the first part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

Tenth: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

Eleventh: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict of interpretation respecting any of the provisions hereof it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of

competent jurisdiction in San Francisco, [105] California.

In Witness Whereof the parties hereto have set their hands this 29th day of January 1943.

P. & J. CELLARS

By PETER BERCUT First Party.

CHATEAU MONTELENA OF NEW YORK

By SERGE HERMANN Second Party."

The supplemental agreement attached hereto dated San Francisco, California, February 3, 1943, is in the form of a letter addressed to Chateau Montelena of New York.

"Gentlemen:

With reference to our agreement executed on the 29th day of January 1943 the following revisions or additions are herewith made, said additional data to be included and to form part and parcel of the original agreement:

- 1. That the quantities stipulated as bottled as of this date are to the best of our knowledge vintage wines of 1937 and 1938.
- 2. That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to

effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence.

3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without [106] change and in full force and effect.

Very truly yours,

P & J CELLARS

By PETER BERCUT."

And the assignment dated New York, February 25, 1943, reads as follows:

"Park, Benziger & Co., Inc., 24 State St., New York, N. Y.

Dear Sirs:

As per our agreement, we hereby assign to you the agreement and all rights thereunder, made on January 29, 1943, with Pierre Bercut and Jean Bercut, doing business under the name of P. & J. Cellars, of San Francisco, California.

Yours very truly,
CHATEAU MONTELENA
OF N. Y.
Per SERGE HERMANN.''

- Q. Mr. Elman, did you subsequently come to San Francisco on this transaction?
 - A. I did, sir.
- Q. Prior to your departure from New York did you obtain or receive any samples of this wine?
 - A. Yes—I am sorry.
- Q. Did you obtain or receive any samples of this wine prior to your departure from New York to come to San Francisco? A. We did, sir.
 - Q. From whom did you receive them, please?
 - A. From P & J Cellars.
- Q. From P & J Cellars; that is referred to in the contract. What do you recall was the nature of the samples that you received, the nature or the quantity?
 - A. There were two cases of assorted wines. [107]
 - Q. Two cases of assorted wines?
- A. Assorted wines, sweets and drys. There were six types, as I recall it, four drys and two sweets.
- Q. Calling your attention to the time at which Mr. Serge Hermann wrote a letter to Bercut Brothers advising them that he had sold and assigned this contract, did you have knowledge of that transaction?

Mr. Naus: One moment, please. That assumes such a letter was written. I ask that the letter be produced before the witness is examined on it. I might say I have no recollection of any such letter.

Mr. Bourquin: It may be a matter of our views on this. I am referring to this letter, and I do not

mean to give it any character except what it is decided to have by the jury.

Mr. Naus: Just so it is clear that you are not offering it as showing Mr. Serge Hermann advised the Bercuts that the contract was assigned.

Mr. Bourquin: I do not. I say that will be my contention, your Honor.

Mr. Naus: I submit the objection as assuming something not in evidence.

The Court: There isn't anything in evidence.

Mr. Bourquin: There isn't anything in evidence, your Honor. Perhaps I had better withdraw that question and approach the matter with another:

- Q. Calling your attention, Mr. Elman, to a letter on the stationery of Park, Benziger & Company under date of February 15, 1943 and signed "Sincerely, Serge," for "Serge Hermann", addressed to Mr. Pierre Bercut, do you recall the writing of that letter?
- A. I do, sir. That was done in our office in [108] my presence and in Mr. Benziger's presence also.
- Q. Before we come to that letter, let me ask you: When did you obtain the samples from the Bercut Brothers, do you recall? Was it prior to or subsequent to the writing of this letter?
- A. Oh, it was prior to the writing of this letter. We received the samples of the merchandise from Bercut Brothers, and then Mr. Serge Hermann came back to New York and we discussed the contract with Mr. Hermann at that time, and we agreed

to take it over, and he wrote this letter at our request at that time.

Mr. Bourquin: I will offer the letter in evidence at this time and ask if I may read that to the jury.

The Court: You may.

(The document was marked "Plaintiff's Exhibit 3.")

Mr. Bourquin: The letter I refer to is on the stationery of Park, Benziger, stamped "Air Mail," under date of February 15, 1943, and is addressed to Mr. Pierre Bercut, c/o Bercut Brothers.

PLAINTIFF'S EXHIBIT 3

"Dear Pierre:

I just returned home last Saturday afternoon. For the last couple of hours we have done nothing else, Mr. Benziger, Mr. Elman and myself, but to talk over the arrangements that I made with you, and I am glad to advise you that they are quite pleased, and I have no doubt that we will develop relations which will prove mutually profitable and agreeable.

The first thing we are now doing is to work on a label. Many suggestions are being made, and of course before we decide upon one, we want to think the matter over very carefully because it is of such extreme importance, and once we have decided what label should be used, [109] it will have to be a good label. At any rate, we will send our final choice to you, so that

you may have a chance to give us also your reaction to same.

From now on I would suggest to you that all correspondence and everything pertaining to our relations be written direct to Park, Benziger & Co., Inc., 24 State St., New York, N. Y., so that it may be given proper attention.

As explained to you in San Francisco, it is my intention, as soon as a label is finished, to come over to San Francisco so as to supervise the first shipment, and I sincerely trust that either Mr. Benziger or Mr. Elman may find it possible to join me in order to meet you and lay the foundation to our future relations.

With reference to the Chianti which you were kind enough to offer me, we are enclosing herewith orders, which are self explanatory. Would you be kind enough to send us a case of this Chianti in pints, billing us with same.

With regards to the label, you will recall that when we were down to see Verdier you showed me a label with a picture of the Napa Valley, which was indeed very beautiful. You suggested then that you would secure the cut for me. We have an idea that this picture of the Napa Valley would look very pretty in conjunction with the label that we have in mind. Will you please, therefore, send us the cuts of the Verdier label.

If you have already taken the pictures which

you contemplated taking of the warehouse with the bottles racked, I would appreciate your sending them to us. If what you have taken is in the form of films, as you [110] intended, we can make the enlargements here ourselves. Everything, of course, in the line of advertising will help.

I have told Park, Benziger & Co. that you would be kind enough to co-operate with them by making a few placements in some of the high spots of San Francisco on our new wine labels. They appreciate your thoughtfulness in this matter, and we will at some future date be able to use this type of placement for promotion material here in the East.

I take this opportunity in behalf of Mr. Benziger, Mr. Elman and myself of thanking you for the many courtesies shown me when I was in San Francisco and can assure you of our future co-operation with the hope that it will benefit all concerned.

With kindest personal regards to Jean, Henri and yourself,

Sincerely yours, SERGE."

There are attached orders of 2,000 cases of light wine, Chianti type bottles, and 500 cases of the same with instructions for labeling and shipment from

J. R. Benziger, President; and there is another order of a similar type of Park, Benziger's attached.

Mr. Naus: Mr. Bourquin, I assume that we are in agreement that those orders in the Chianti type bottles were unrelated to the contract in issue.

Mr. Bourquin: No, we are in agreement that these are other wines.

- Q. Mr. Elman, you said on February 15, as that letter indicates, [111] you had made an arrangement with Mr. Hermann and took over the contract; is that true? A. Yes, we did.
- Q. Did you subsequently cause him to execute the written assignment of the contract that appears on Plaintiff's Exhibit 1 here now?
 - A. Yes, we did.
 - Q. Under date of February 25?
 - A. That is right.
- Q. Did you at the time you bought his contract make an arrangement with Mr. Hermann for a consideration for him?
- A. Yes, we made an arrangement with Mr. Hermann for the assignment of the contract. [112]

Mr. Naus: I assume the original of this is no longer available, Mr. Bourquin (referring to document handed to Mr. Naus by Mr. Bourquin).

Mr. Bourquin: I have asked Mrs. Herzig, who tried the case before—

Mr. Naus: At the other trial I asked for the production of the original which was supposed to be

still in New York, so in lieu of that we used the photostat. We can still use the photostat if the original is unavailable here, but if it is here I would like to see it.

Mr. Bourquin: Well, if we have the original here we will produce it. May I use the photostat now?

Mr. Naus: Proceed. Can Mrs. Herzig let us know at two o'clock if you have the original?

Mr. Bourquin: Yes. I don't need to identify this further, Mr. Naus?

Mr. Naus: No.

Mr. Bourquin: We will offer this in evidence.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Bourquin: This letter is on the stationery of Park, Benziger & Co., Inc., and the letter is dated February 25, 1943, and is addressed to

PLAINTIFF'S EXHIBIT 4

"Mr. Serge Hermann, 48 West 48th St., New York, N. Y.

Dear Mr. Hermann:

In consideration of your assigning to Park, Benziger & Co., Inc. the contract which Chateau Montelena of New York, represented by Serge Hermann, made with Messrs. Pierre and Jean [113] Bercut, trading as P. & J. Cellars,

of San Francisco, California, covering an approximate lot of 60,000 cases of Assorted Wines, we hereby agree to pay you a commission equal to 50% of the net profits derived from the handling and sale of these goods at wholesale or retail, and you are to exert your efforts to the best of your ability in the promotion and sale of the above merchandise.

You are also to participate in any further business we may have with P. & J. Cellars on the same basis. If we sustain a loss on any business with P. & J. Cellars, such loss shall be charged against future profits in the computation of your commission on future business.

Yours very truly,

PARK, BENZIGER & CO., INC., J. R. BENZIGER,

President."

Mr. Bourquin: Q. Following the dispatch of the letter of February 15 that has been marked here as Plaintiff's Exhibit 3, which you say Mr. Hermann wrote at your instance to Bercut Brothers, did you receive a letter acknowledging receipt of that?

Mr. Naus: You are assuming he said it was written at his instance. He said it was written in the presence of the two. There is no suggestion so

far of Hermann writing it at the instance of-

The Court: I thought Mr. Elman said he suggested that Mr. Hermann write the letter.

The Witness: I did, sir.

Mr. Naus: I will accept that.

Mr. Bourquin: Q. Did you receive a reply from Bercut Bros., a reply letter to that letter?

A. Yes, we did, sir. [114]

Mr. Naus: As to any letters used at the former trial you can proceed without a further foundation and if either of us has any original that has not been produced before we will produce it.

Mr. Bourquin: All right. I am calling attention to a letter on the letterhead of Merchants Ice & Cold Storage Company, dated February 26, 1943. We will ask it be admitted as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Bourquin: I think I should read it.

The Court: Proceed.

Mr. Bourquin: A letter on that letterhead addressed to:

PLAINTIFF'S EXHIBIT 5

"Park, Benziger & Co., Inc., 25 State Street, New York City, N. Y.

Letter #1

Attention: Mr. Jos. P. Benziger, President Dear Mr. Benziger:

This communication will acknowledge your letter and enclosure relative to various matters pertaining to our wine transaction. It will also confirm the exchange of telegrams between us as follows:

Ours—Feb. 24, 1943: 'ODT regulations prohibit shipment less than 50,000 lbs. Necessary increase number of cases 550 total 1300 for approximate minimum. Wire instructions regarding inclusion other stock to effect shipment'

Yours—Feb. 25, 1943: 'Re your wire 24th reference our Order Number One. Hold shipment pending airmail instructions.' [115]

The photographs, which your Mr. Serge Hermann desired, have been forwarded, and shipment of one case of (Cresta De Oro) Chianti type bottles 12/30 oz. bottles to a case has been shipped by express today in accordance with the instructions in his telegram.

Tonight the following wire was forwarded to you: 'Sufficient additional cases 12/30 oz Chianti available to ship minimum car 50,000

pounds. Wire permission to ship if satisfactory. Sample for Hermann express today.'

Upon receipt of your reply to this wire it may be possible to ship the first of next week. At that time the 750 cases mentioned in your order No. 1 at \$6.00 per case plus 550 cases applying on the 2,000——"

That was the Chianti, I guess?

Mr. Naus: The whole letter is about the Chianti, with the exception of the reference to the sample to be expressed.

Mr. Bourquin: That is a matter of construction.

Mr. Naus: Well, you asked me, Mr. Bourquin. I gave you my understanding.

Mr. Bourquin: I don't think it makes any difference. (Resumes reading:)

"2,000 cases mentioned in order No. 2, @\$6.50 per case, and plus the 6 cases comprising one case of each kind of wine in stock at the prices quoted in our contract could be forwarded."

Now, in view of the discussions, I would like to read that paragraph again.

The Court: Very well.

Mr. Naus: Surely.

Mr. Bourquin: (Resumes reading)

"Upon receipt of your reply to this wire it may be possi- [116] ble to ship the first of next week. At that time the 750 cases mentioned in your order No. 1 at \$6.00 per case plus 550

cases applying on the 2,000 cases mentioned in order No. 2, @ \$6.50 per case, and plus the 6 cases comprising one case of each kind of wine in stock at the prices quoted in our contract could be forwarded.

Your procedure concerning the labels has been noted. Naturally, we do not have any interest insofar as the identity of the supplier is concerned, although we are keenly interested in the design of the label when completed.

We were pleased that the arrangements made by your Mr. Serge Hermann met with your approval and will be looking forward to your contemplated visit to our city.

In our opinion, it is quite possible to lay the foundation for a continuing mutually profitable relationship in the distribution of wines, and maybe promote a thriving industry based on the aging of wine in bottles.

With kindest regards to Mr. Hermann.

Very truly yours,

PETER BERCUT."

The Court: Will you kindly give us the date of that letter?

Mr. Bourquin: That letter, your Honor, is February 26, 1943.

Q. Mr. Elman, will you please tell us briefly what did Park-Benziger do with respect to their

(Testimony of Philip Elman.) side of the contract in the preparation of labels at New York?

- A. We held several conferences in the offices, at which time we were discussing different phases of the labels that should be used for domestic wines and that would also reflect the quality of the merchandise which we had purchased. We hired artists to design for us labels and submit them for our approval so that [117] out of the artists' drawings submitted to us we could take one label which we sent to Washington to have it federally approved after we had decided with great care as to the type that we wanted, and we submitted the information that we were desirous of putting on that label to see whether it met the regulations required by Washington, to see if we could put what we wanted on those particular labels drawn up by the artists and forward the proper forms and sheets to Washington. We were in the process of making up a label which we were going to bring out here to affix to the bottles of wines which we had purchased under this contract. We were performing that end of the terms of that contract.
- Q. When did you come to San Francisco to arrange delivery?

 A. That was April 16th, sir.
- Q. That was April 16th. Had Park, Benziger then decided upon its label?
- A. Yes, we had. By that time we had sent a copy of a label to Mr. Hermann, who had preceded me here, and had asked him to show it to Mr. Ber-

cut, and he had wired back that Mr. Bercut had seen the label and liked it, and from that point on we were satisfied to go ahead with the final completion of running labels for the merchandise.

Mr. Bourquin: I desire, Mr. Naus, at this time to put in evidence the labels that were formerly marked Exhibit 9. Are you familiar with that exhibit?

Mr. Naus: Yes. They were called a proof sheet at the other trial.

Mr. Bourquin: Q. I will show you, Mr. Elman, what I hold in my hand and ask if that represents the label which was decided upon by Park, Benziger & Company? A. It was.

Mr. Bourquin: I ask that the document showing the two labels, [118] or style of labels, whichever you call it, be admitted in evidence as plaintiff's exhibit.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Bourquin: Q. Following your purchase of that contract, you had arranged with Mr. Hermann, did you, you had entered arrangements for the services of Mr. Hermann in the sales of the wines?

A. Yes. We decided to employ Mr. Hermann as a salesman of Park, Benziger & Company, and we submitted to the New York State Liquor Authorities an application for a solicitor's permit in New York State.

- Q. That was a solicitor's permit issued at your request to him as a solicitor or salesman for Park, Benziger & Company? A. Yes.
 - Q. Taking effect when?
- A. Taking effect almost immediately, after we had decided to purchase the contract from him.
- Q. Well, that was February 15th to February 25th, as I understand it? A. Yes.
 - Q. When you completed your paper work?
 - A. After February 25th, yes.
- Q. When you came to San Francisco. Mrs. Herzig calls my attention to that permit——

Mr. Naus: Would you simply state the substance of it to the jury? I believe it goes back to February 20, 1943.

Mr. Bourquin: I am not sure.

Mr. Naus: No objection.

Mr. Bourquin: I think I will read it, your Honor, or state the substance of it.

The Court: Proceed.

Mr. Bourquin: A solicitor's permit, No. 2968, State of New York Liquor Authority, Expires December 31, 1943. This cer- [119] tifies that Serge Hermann, whose photograph—the name of the solicitor whose photograph and signature appear here, is authorized to solicit and receive orders for the sale of alcoholic beverages in the State of New York for Chateau Montelena of New York. This one that I have here shows permit—I will read it—"Chateau Montelena of New York License Number

—Year 1943. Permit not valid unless it is signed and the State Seal affixed. State Liquor Authority." That is signed by a signature that I am not able to decipher. On the back of the permit shows, "First endorsement Park, Benziger & Co., Inc., LL 281 (G). Is that the license? A. Yes.

Q. For which you have testified arrangement was made? A. That's right.

The Court: Does it have a date?

Mr. Bourquin: The only date on it, your Honor, shows on the face of it that this permit expires December 31, 1943.

Mr. Naus: That is merely a solicitor's permit for while he theoretically was a salesman for Chateau Montelena of New York, and then the solicitor's permit was transferred from Chateau Montelena of New York to Park-Benziger.

Mr. Bourquin: Yes.

Mr. Naus: I don't think Hermann, himself, ever had anything other than a solicitor's license.

Mr. Bourquin: I don't think it is material. If it is you can bring it out.

(Solicitor's license was received in evidence and marked Plaintiff's Exhibit 7.)



2969 SOLICITOR'S PERMIT STARE OF NEW YORK LIQUOR AUTHORITY EXPIRES DECEMBER 31, 1943 SERGE HERMANN his certifies that_ (Name of solicitor)

whose photograph and signature appear hereon is authorized to solicit and eceive orders for the sale of alcoholic beverages in the State of New York for Chateaus elena or (Xored li This permit is not valid unless it is signed and the State Seal affixed. STATE LIQUOR AUTHORITY (OVER) FIRST ENDORSEMENT SECOND ENDORSEMENT (License No.) . (Name of licensee) THIRD ENDORSEMENT (Name of licensee) (License No.) FOURTH ENDORSEMENT (Name of licensee) (License No.) FIFTH ENDORSEMENT (Name of licensee) (License No.) NOTICE o solicitor shell offer or give any refund, rebate or thing of value or render any ervice to any licensee for the purpose of influencing a sale. The permit of any licitor engaging in any such act or who is a party thereto shell be revoked. When the solicitor's employment is discontinued this permit must be surrendered to the zone office of the State Liquor Authority which issued such permit. Exhibit No. Calbreath, Clerk bibit No. 15 Walter B. Maling, Clerk mars G. Witchell



Mr. Bourquin: Q. When you arrived in San Francisco, Mr. Elman, did you meet the Bercut Brothers? A. Yes, I did. [120]

Q. You said you arrived here on the 19th, or the 18th——

The Court: On the 16th.

The Witness: Around the 16th.

Mr. Bourquin: Q. Where did you meet the other gentlemen, and with whom?

- A. I met Mr. Jean Bercut and Mr. Henry Bercut at the market just the first time I arrived. Subsequent to that I met Mr. Peter Bercut, and that was while Mr. Hermann and I were together.
- Q. You remained in San Francisco at that time for how long?

 A. For several weeks.
 - Q. For several weeks? A. Yes.
- Q. Did you see Mr. Jean Bercut or Mr. Peter Bercut, or both of them, from time to time after your first visit?

A. Consistently; every day from the date I arrived. I believe I came here on a Friday. I saw him Friday and Saturday, and then we did not see him on Sunday, and Monday, which was a business day, we started in with our meetings again with either Mr. Jean Bercut or Mr. Peter Bercut, consistently, right through that entire week, working and arranging for the bottling of those wines. I went down to see the wines, I had never seen them before, saw how they were racked to get a picture of it so I could build it into a campaign of promo-

tional sales. We had started taking films of the huge warehouse with Mr. Jean Bercut or Mr. Peter Bercut alongside the wines, looking at a bottle of wine. Those films were to be used for promotional work to show the huge 325,000 cases bottled, at least 325,000 bottles that were built into that magnificent warehouse there, that were aged and stored and racked. This was going to be the story on the business of aging wines in this country, it was something entirely new and novel. I mean it had never been done in the United States. [121]

- Q. When you went to see the wine who did you go with?
- A. With Mr. Hermann and several friends of ours, and Mr. Jean Bercut, and I went with Mr. Peter Bercut once.
- Q. During that week that you spoke of here, did you hold any discussions or conferences with either of the Mr. Bercuts, or together with them, with respect to the packing or shipping of the wine?
 - A. Yes, yes.
- Q. Tell us the substance of your discussions and what transpired in that respect.
- A. Well, we were discussing the legal information that had to go on the cases, the cartons. In other words, these were tax-paid wines, and they require a little different information than the average type of bottled wine which is bottled in a winery, bottled at the winery or bottled from these various vats or tanks. There were discussions about

the stamps, the Internal Revenue stamps which are affixed to the cartons, and that information is contained on the side of the carton, but in this particular instance all the wines had been tax-paid in the storage warehouse at the Merchants Ice & Cold Storage, or P. & J. Cellars.

- Q. Had you finished?
- A. Well, all the bottles had a small sticker that was affixed to them, that said they are sold for intrastate sale only and tax paid by stamps affixed, and the usual information pertaining to the fact it comes from tax paid containers.
- Q. I want to call your attention here to a bottle of liquid with a label of "California Sherry Wine" on it. Is that what you are now talking about?
 - A. Yes, that is the type I am talking about.
- Q. The label reads, "Alcoholic content 20% by volume. Contents 4/5ths. Bottled by Fruit Industries Corporation, San Francisco. [122] Tax paid by stamps affixed to bottle for sale in California only." Was that what was on the bottles?
 - A. Yes.
 - Q. And all of them? A. Yes.
 - Mr. Naus: Was that 20 percent on all of them?
 - A. No.
 - Q. Just the sherry?
 - A. Each type has its own alcoholic content.

Mr. Naus: I didn't understand he was suggesting that there was a 20 percent alcoholic content in all the bottles.

The Witness: No.

Mr. Bourquin: Q. This bottle I show you here, without going back too far, will you tell us whether or not that was of the type with stamps that Bercut Brothers forwarded to you in New York at the time you mentioned to us before you came to San Francisco?

- A. Yes, that is the identical type.
- Q. That is the identical type of merchandise?
- A. Yes.
- Q. By the way, the particular bottle which was produced here on the earlier trial, do you know where this particular one came from?
 - A. I think I brought that from New York.
- Q. This is one you believe you brought from New York for the earlier trial? A. Yes.
- Q. So we will understand this subject, did the bottles that you called our attention to showing tax paid, or stamps affixed to the case bearing the legend, "Bottled for sale in California only," did that present any problem for you and the Bercuts in working out your contract?
- A. Yes and no. It meant that we would have to get Federal approval on the labels before they could be shipped out of the State.
 - Mr. Bourquin: May I offer this in evidence?

 (The bottle of wine was marked "Plaintiff's Exhibit 8.")

Mr. Bourquin: Q. That means you had to make arrangements with the Federal Alcohol Tax Unit before you could ship it out [123] of the State?

- A. Yes.
- Q. Did you make such arrangements?
- A. Yes, definitely.
- Q. What had you done in that respect?
- A. Those were the F.A.A. matters, Federal Alcohol Administration, regarding the labels which we had forwarded to Washington for approval on that label that you showed me.
 - Q. Before you came here to San Francisco?
 - A. Yes.
- Q. Will you tell us what arrangements or discussions, or both, you had with the Bercuts with respect to the packing and delivery of these wines during the week you mentioned?
- A. We had discussions about the cartons or these wines. We were up to the carton people at Mr. Bercut's suggestion here in town, the Fibreboard people, talking to them about it. Mr. Peter Bercut had placed an order from the Bercut Richards Company, which is one of their fruit cannery places down in Sacramento, and in order to get cartons for his wine bottles he had to do that, because they were starting to get scarce. We asked them to submit a price for these cartons which had to be made up in different sizes, depending on the wine bottles that went into them, to quote a price, and they had sent the quotation of the prices to Sacramento and they had been sent to the Bercut-Richards place. We went down to the Bercut's Ice & Cold Storage place and viewed the storage room right alongside

the outer room that was alongside the storage room, and which was piled high with cases of wine. We looked at those.

- Q. You say "we". Who went down to the storage place?

 A. The Bercuts.
 - Q. Jean or Peter, or both?
- A. Both of them. It was either one or the other consistently.
- Q. What was your testimony with respect to the room right outside [124] the storage plant where the cases were?
- A. They seemed to think it would be a good place to put in their laborers, a little room in which they could work on the bottles, label all the bottles and put them in cartons. It was close by to a car siding, so that freight cars could roll up and they could load the bottles directly from the outer room right over to the cars, without having any additional means of motivation, because it was just outside of that ice place. They said it would be the cheapest way for them to do it. We discussed the proposition of getting machinery for facilitating the packing and facilitating the labeling and getting the cartons filled.
 - Q. You spoke of labels. A. Yes.
 - Q. They were to do that? A. Yes.
 - Q. And pack the cases?
 - A. They were to pack the merchandise.
- Q. Did you come to a decision, a mutual decision with respect to the use of that adjoining room for that work at their place?

- A. Yes. They thought it was going to be—I had offered to have a bottler re-label the wines and had made inquiry for them as to what it would cost. Mr. Bercut said, "Well, he would probably be able to do it more reasonably right here alongside of our warehouse and we can facilitate the delivery of the merchandise to the cars." He said that it would be much too expensive to do it the way I suggested, that the most reasonable way to do it would be to do it right there.
- Q. They suggested, if I understand, that instead of contracting it out they would hire the labor to do it at their own warehouse?

 A. Yes.
 - Q. Did you accept that? A. Yes.
- Q. Did you have any discussion with Mr. Peter Bercut or Jean Bercut with respect to conditioning the bottles for packing and [125] shipment?
- A. Yes. The bottles as they laid in the racks there were rather dusty in the warehouse. I asked them to have the bottles cleaned and polished so that they would be more presentable, and with little tissue paper, that they would present a clean appearance. He said, well, he wouldn't do that, he wouldn't clean them. He would clean them up at the top, but he wouldn't clean them all up, it was too expensive to do, that they would get dirty in the carton, anyhow. He said it would be just as well if he just took care of the tops that were real dusty and the balance was all right as put in the carton, and didn't need any tissue paper.

- Q. How about wrapping them, was that agreed on, too?
- A. Well, it was an additional expense, too. I said to him it was a very fine product, it was a high-priced piece of merchandise and it should carry all the characteristics of a high-priced wine, a quality piece of merchandise.
 - Q. What was the discussion on that feature?
- A. Well, they said it wasn't necessary to do that, but if you wanted to do it and stand the expense that it wasn't in the contract. You could do it if you paid for the tissue paper.
 - Q. What was decided?
 - A. We left that open.
- Q. Speaking of that week again, do you recall the date at the outset of the week, Monday? What was the date of the beginning of that week, was that the 19th, a Monday?
 - A. Oh, yes, right around the 19th.
 - Q. Was the 19th a Monday?
 - A. I think it was.
- Q. Will you tell us whether or not you carried on those discussions on the features you mentioned every day of that week, and with whom?
- A. With either one of the two of them; Mr. Peter Bercut was at the ranch quite a lot during that week and he also had some litigation [126] to attend to in Sacramento. I met him once in his place of business, but most all of our business was conducted with Mr. Jean Bercut.

- Q. At the end of the week had there been anything set in motion, had anything been set up?
- A. No, there hadn't been anything done. There was lots of discussion on it. We looked around. I looked around quite a bit. I went down to the Fibreboard people; yes, they had been asked to submit prices on cartons to Bercut-Richards, yes, they had received an order from Bercut-Richards for the cartons, and so I would tell that to Jean the following day and he would say, "I will get in touch with Pierre"; evidently he was at Sacramento or at the ranch, and we should know the following day. That went straight through that entire week; we discussed everything. We were going to get it all done and nothing seemed to be done.
- Q. During that time did you encounter any rupture or did things go along smoothly, evidently?
- A. Well, there were no ruptures, things went on smoothly, perfectly smoothly.
- Q. Any indication during that week that they were disinclined to meet their contract?
 - A. No.
- Q. Or that there was any difficulty, anything like that?

 A. No, no, not at all.
- Q. During that week would you tell us, did you attend any social visits with either of the Bercut Brothers?
- A. Yes. Mr. Jean Bercut invited me to his house. We had supper there, prepared a very fine supper for us. Mr. Hermann was there also. Mr. Jean

Bercut took us up to Mr. Verdier's house and introduced me to Mr. Verdier, that is, Mr. Verdier of the City of Paris. We spent a very pleasant part of the evening with Mr. Verdier and his sister, Madame de Tesson, and afterwards Mr. Jean Bercut took [127] us home to the hotel. That finished that night. The following morning he picked us up again. The same thing—

- Q. You speak of him picking you up. Was that rather the practice, he would pick you up in the morning and take you to the office at the Merchants Ice plant?
- A. Yes. When we went down there he would do that.
- Q. When you adjourned the business for the day would be drive you uptown to your hotel again?
 - A. Yes.
 - Q. And you were stopping where?
 - A. At the Chancellor.
- Q. Mr. Elman, calling your attention to the 26th; was that a Monday?

 A. That's right.
- Q. Did you meet with the Bercut brothers on that day and continue your conferences?
- A. Yes. I went down to the Merchants Ice with Mr. Serge Hermann.
- Q. How did you go that day? Did Mr. Jean or Mr. Peter pick you up, or did you go by yourselves?
 - A. I think Mr. Jean Bercut picked us up.
- Q. Following the day's business, did he drive you back? A. Yes.

- Q. Going back for a moment, during the earlier week while you were discussing all of the procedure for the deal on the contract, did you and the Bercuts have any other business?
- A. Yes. We were looking for some Vermouth and champagne, and we were talking about that, and during the entire week he offered me some other types of merchandise.
- Q. When you say "we," did you mean Park, Benziger & Company? A. Yes.
 - Q. You did not do any business personally?
 - A. No, sir.
- Q. Let me take you for a moment to the week that we have just been speaking about, had Park, Benziger & Company received any merchandise from the Bercuts?

 A. Yes, Chianti wine.

[128]

- Q. In quantities?
- A. Carloads, they had always one carload.
- Q. Were those handled sight draft bill of lading?
- A. Yes, they were for cash.
- Q. Calling your attention to the 26th, your meeting on that day, how many of the Bercuts were there?
 - A. Mr. Peter Bercut and Mr. Jean Bercut.
 - Q. Was Mr. Hermann with you on that day?
 - A. Yes.
- Q. On that occasion will you tell us whether or not either of the Mr. Bercuts voiced any dissatisfaction with Mr. Hermann?
 - A. They certainly did.

Q. Will you tell us by whom and what it was; just go ahead and tell us.

A. Well, as I recall, Mr. Jean Bercut asked me to step in the office and asked Mr. Hermann to wait outside. He said, "Mr. Elman, I would like to talk to you for a few minutes; Serge, would you sit down a few minutes until I get through?" He said, "Fine." We went in and when I was in there with him he said, "Mr. Elman, I have some very bad news for you." He said, "We have inquired about Mr. Serge Hermann and find he had some business dispute here in town and we would not like to do any business with him, we would like to have our contract with you"; I said, "Well, that's fine; we are doing business together," I said, "but what is this business dispute about?" He explained the entire business dispute related to this Chateau Montelena dealing of some kind or other. So I told him then, I said, as I recall it, "I am sorry"—Oh, yes. He said, "We don't want to have anything to do with Mr. Serge Hermann because of the business deals we have heard about him." I said, "Well, the contract was assigned to Park-Benziger. You have been doing business with Park, Benziger right along and you will continue to do business with Park, Benziger," He said, "We don't want to have anything [129] to do with Hermann at all." I said, "Well, of course, that is impossible, because we have an arrangement with Mr. Hermann, but we will take care of him." I said,

"We will take all the wine that we are purchasing from you." He said, "No, we don't want him to have anything at all to do with the deal." I said, "Well, we don't have anything to do——"Then Mr. Evans, who was sitting in on this——

- vans, who was sitting in on this——Q. Mr. Who? A. Evans.
- Q. Tell us who Mr. Evans is.
- A. He is the general manager of Merchants Ice & Cold Storage, I imagine.
- Q. Had he attended earlier meetings with you and the Bercuts?
 - A. Yes; we met him right along.
 - Q. You were going to tell us what he said.
- A. Yes. He said something—Mr. Peter Bercut handed him a contract and Mr. Peter Bercut said to me, handing me this contract, he said, "Well, do you see anything in this contract that says Mr. Hermann has the right to assign?" I looked at the contract and I said, "Apparently there is nothing in there that says he has the right to assign." I then made the point he had the right to assign because the contract went to our lawyers in New York and we told them to look over that contract and they forwarded it back to us as being all right legally, as far as they were concerned, the deal was excellent for us. So we naturally made arrangements to have the assignment completed and so on. Then I said, "In all fairness," I said, "you ought to have Mr. Hermann come in and tell his side of the story." So Jean went out and called Mr. Hermann in and

Mr. Hermann came in and they told him about what they had heard about Chateau Montelena. Mr. Hermann said he would be very glad to get in touch with some others in San Francisco who had told them about this business dispute, and who could explain any doubt [130] that they had pertaining to it, and so forth. Then Mr. Peter Bercut gave Mr. Hermann the contract and said to him, "Will you show me where this says in here that you have the right to assign that contract?" Mr. Hermann's answer was, "Will you show me where this says I haven't the right to assign the contract; you were doing business with Park-Benziger right along. What is it all about? If it has something that you do not like, why didn't you tell them about it?" He said, "You are doing business with them." He said, "Well, we want you to give us a personal release from the contract, we don't want to have anything to do with you, we want to do our business with Park, Benziger & Company; we don't want to have anything to do with you." Mr. Hermann said, "Well, if that's the way you want it, I have my agreement with Park-Benziger, it's all right with me." They said, "Yes, we want to have a personal release from you, because we want to do business with Park-Benziger; now, give us a personal release." He said, "Sure, if that's the way you feel about it it's all right with me, as long as the agreement can continue on with Park-Benziger and yourself." So we left then.

- Q. Did that rupture put an end to this cordial relationship that you had between you?
- A. No, no, everything was smoothed out. Then, I might back up there a moment, Serge said it was all right with him, he was going to give them the release they wanted for the purpose of facilitating the deal.
- Q. In that conference that day was there discussed any question as to the acceptance of the contract? A. Yes.
- Q. Was that on the question of the right to assign? A. Yes.
 - Q. Tell us what was said with respect to that?
- A. When the contract was shown to me I said, "Well, it has a top sheet that this contract has not got." So Mr. Peter Bercut asked Mr. Evans, [131] "Where is the top sheet?" Mr. Evans said to Mr. Peter Bercut, "I have no copy of that sheet." I said, "Well, I have the original contract with me with that top sheet at my hotel and you can see it if you want to."
 - Q. How did you leave the business on that day?
 - A. Very friendly.
- Q. Did you have transportation, or did the Bercuts take you home?

 A. The Bercuts took us.
 - Q. Who took you?
 - A. Mr. Bercut took us up to the hotel.
 - Q. Mr. Jean? A. Mr. Jean Bercut.
- Q. You say he took you. Did Mr. Hermann go along? A. Yes.

- Q. The following day did he return to the hotel? That would be the 26th.
 - A. It was around 2:00 o'clock in the afternoon.
- Q. Did he speak with you when he left you at the hotel, or did he just drop you and go on?
- A. No. Mr. Bercut—after we had broken up and went outside, Mr. Bercut asked me to step into the warehouse a moment, and he said, "It's all right as far as Hermann is concerned, as long as he has signed the release——"

The Court: When was that?

A. That was after we had broken up on that Monday. It was before Mr. Bercut was taking us up——

The Court: I thought you said Mr. Bercut also took you to the hotel.

A. Yes, I did. It was—

Mr. Bourquin: He is evidently doubling back, your Honor.

The Court: Yes.

Mr. Bourquin: But unless it is confusing I would like to cover that subject later.

The Court: Well, it is confusing.

Mr. Bourquin: I will come back to that.

- Q. Mr. Elman, would you go ahead with the question I asked you, whether Jean Bercut dropped you at the hotel and went away or did he speak with you at the hotel?
 - A. He stopped with us at the [132] hotel.
- Q. What transpired on his stop at the hotel that afternoon?

A. We went up to the room and I showed him the contract that he had asked to see, the one which I had discussed. I said I had this with me from New York with the top sheet on it. I showed it to him. He asked me whether he could show it to Peter. I said, "Certainly, you can," and he took it with him and went down—before he left he said, "Well, I'll be back around five o'clock and will see you then and we will go up to the house for supper again." I said, "Fine." About five o'clock he came back and we went up to his house for supper that evening.

- Q. Did Mr. Hermann go, too? A. Yes.
- Q. You spent the evening there?
- A. Yes, we spent the evening at his house and Mrs. Bercut was home that evening and we danced.
- Q. To get back, then, when this meeting of the 26th had broken up did you and Jean Bercut have any further discussion between yourselves about Mr. Hermann or his part in the matter?

 A. Yes.
 - Q. What was that?
- A. As we went out of the office, Mr. Bercut and I and Mr. Hermann, he was a little behind us there, and Jean said, "Wil you come into the warehouse a moment, I want to show you some wine?"
 - Q. Is Jean, Jean Bercut?
- A. Jean Bercut, yes. He said, "I want to show you some wine." As we went into the warehouse he said, "What I really wanted to tell you, Mr. Elman, is, it's all right as far as Hermann is concerned,

you can pay him if you want to, but we will want a personal release from him." I said, "He agreed to give it to you; it doesn't affect us, we have a contract with you, so it's all right."

- Q. The following day, that would be the 27th—
- A. Yes. [133]
- Q. The following day did you meet again with the Bercuts at the office of the Merchants Ice & Cold Storage? A. Yes.
 - Q. Mr. Hermann there, too?
 - A. Yes, he was there.
- Q. How many Mr. Bercuts were there that morning?
- A. Both Mr. Bercuts were there that morning, and Mr. Evans.
 - Q. Was Mr. Evans there also?
 - A. Yes, he was.
 - Q. He was the accountant or manager there?
 - A. Yes.
- Q. Just tell us the subject of your conference there, what transpired.
- A. Well, that morning I came in I handed Mr. Evans an order which I had received from the mail, or in the mail, pertaining to the final shipment of another quantity of wine, and I laid it on the, on his desk, and told him to expedite the shipment on that. On the table as we came in were quite a number of copies of papers, it was a release. Mr. Peter Bercut was sitting down there. Mr. Jean brought us in and Mr. Evans handed Mr. Hermann these

(Testimony of Philip Elman.)
papers and said, "This is the release we made up
for you."

- Q. Handing it to whom?
- A. Handing it to Mr. Hermann.
- Q. Had it been shown to you, Mr. Elman?
- A. No.
- Q. He just handed it to Mr. Hermann?
- A. Yes.
- Q. What did he say about it?
- A. He said, "This is the release that we were talking about yesterday." Mr. Hermann examined it and there were some discussions there, and Mr. Hermann handed it to me and said, "Is it all right, Phil?" I looked at it and I said it was an agreement between Chateau Montelena and Serge—or P. & J. Cellars and Serge Hermann. I said, "I have nothing to do with it. Evidently that is the release that Mr. Bercut was talking about. We have a contract. I can't see any objection to it." I handed it to him and Serge signed it.
- - Q. As the meeting adjourned, what happened?
- A. Mr. Peter Bercut got up and said he had to go up to Sacramento, he had some work to do, and we could carry on with Jean Bercut and, I mean we could carry on our negotiations with Jean Bercut, our business with Jean Bercut, so Mr. Peter Bercut

and Mr. Jean Bercut—Mr. Peter Bercut went out and Mr. Jean Bercut went out with Mr. Peter Bercut, and about fifteen minutes later Mr. Jean Bercut came back into the room and told me that he refused to perform this contract.

Q. What did he say, can you give us his words, the substance?

The Court: Can we stop here?

Mr. Bourquin: Yes.

The Court: Ladies and gentlemen, please keep in mind the admonition I have heretofore given you. We will be in recess until 2:00 o'clock. The jury may now retire.

(A recess was here taken until 2:00 o'clock p.m.)

Wednesday, March 14, 1944—2:00 P.M.

Philip Elman
Resumed
Direct Examination
(continued)

Mr. Bourquin: Q. Mr. Elman, I omitted to ask you this morning: Is Park, Benziger & Company a corporation organized under the laws of New York?

- A. It is.
- Q. It was a New York corporation at the time of the contract we are talking about here?
 - A. It was.

- Q. And still is?
- A. Still is.
- Q. This morning you had told us last of what transpired at the offices of the Merchants Ice, wasn't it?

 A. That is right.
- Q. That is where all the conferences were held—on the 27th? A. Yes.
- Q. When you said that after Mr. Jean Bercut came back to the room he told you now the contract was out and he would give you three cases; is that right?

 A. That is right.

Mr. Naus: Did he say three cases?

Mr. Bourquin: I beg your pardon again. I mean three carloads. Mr. Naus asked if I meant three cases, your Honor. I am not used to handling so much wine, your Honor.

The Court: You do not buy it in carload lots.

Mr. Bourquin: Q. Will you tell us in substance what Mr. Jean Bercut said, how he put it, when he came back to the room.

A. When he told me that I said, "What do you mean?"

He said, "You don't want any contract. I will give you three carloads of wine at the contract price, and that is all."

I said, "What do you mean, three carloads of wine? We have a contract with you." [136]

He said, "Well, I will give you three carloads of wine at the contract price, and maybe later on—we will see, we will see." He said, "For cash."

I said, "What do you mean? We have a contract with you for 60,000 cases of wine. Now, you have a stipulated price in there and you have the quantity of merchandise in there, and that is what the company wants to be performed."

He said, "No more contract. We don't want no more contract. I will give you three carloads of wine, and maybe later on the wine will be worth eight or nine or ten dollars to you."

I said, "What do you mean, eight or nine or ten dollars? The price in the contract is stipulated at \$5.25."

He said, "Yes, I know, I know, but just three carloads of wine."

I said, "We have a contract with you for 60,000 cases of wine at stipulated prices under certain terms. My company wants that contract performed, and that is what I am out here for."

Then I got all excited and everything and walked out of the place, I guess.

- Q. Then did you leave the premises yourself and come away?
- A. Yes, I went out. Mr. Hermann followed me, I guess; Mr. Bercut came out later.

Mr. Jean Bercut said, "Wait a minute, wait a minute. Don't get excited. We don't want any trouble. I will talk to Pierre when he gets back from the ranch in the morning and everything will be straightened out." He said, "Don't worry, I will straighten out everything in the morning when Pierre comes back."

I said, "My God, why do you tell me that immediately when I [137] come from Los Angeles? I can't understand that kind of language?"

He said, "It is all right. I will tell you what we will do: I will get a big carload of Chianti for you; we will make up a big carload of Chianti. We haven't been able to get any glass from Mexico, but we are expecting a shipment. I know a merchant here. We will go back up to my office and call him."

I said, "All right."

Mr. Hermann and I and Mr. Jean Bercut got in the car and drove up to his office there, and on the way up he said, "Don't worry, Mr. Elman; as long as Hermann is out of the deal we will do a lot of business together. There will be a lot of merchandise for you to purchase from us. We will do a very big business. I will call up this fellow about the Chianti bottles and see if I can't get those bottles down there for you and make up a big carload of Chianti wine for you, as long as Hermann is out of the deal. Come down yourself tomorrow. Don't take Hermann with you. He isn't in the deal any more. Come down by yourself."

I said, "That is all right." After all, Hermann agreed that he was to be out of the picture so far as they were concerned. We had a contract with them. It was all right with us, and so forth. I was definitely amenable to it. I went down to the office and went back to the hotel.

Mr. Hermann was waiting downstairs.

- Q. You are speaking of an office. What office are you talking about?
 - A. The Bercut office over the Grant Market.
 - Q. He had driven you back to there, had he?
 - A. Yes, from the Merchants.
- Q. You got out and had been in the office with him in the Grant Market that afternoon?
 - A. Yes, that is right. [138]
- Q. That day did he drive you on from the Grant Market up to your hotel, or did you go by yourself?
- A. I think we walked up by ourselves from there. It is only a few blocks from the Grant Market.
- Q. Did you go down the next morning by your-self as he had asked you?
- A. No, he said he would call me at nine o'clock the following morning—at least call for me at the hotel at nine o'clock the following morning and take me down to Bercut's, where we were going together.
 - Q. Did he do that?
 - A. No, he didn't.
 - Q. Did you hear from him?
- A. Yes, I did. I got a telephone call at the hotel from Mrs. Bercut.
- Q. Did you hear from Jean Bercut that morning?
- A. Yes. Mrs. Bercut got on the phone and said, "Mr. Elman?"

I said, "Yes." And we exchanged pleasantries over the phone.

She said, "Just a minute. Jean wants to talk with you."

I said, "Fine!"

Jean got on the wire. We exchanged pleasantries.

He said, "Pierre won't be back until twelve o'clock, so I won't be down to pick you up now."

So I said to him, "Well, Mr. Bercut, do you mind if I pick up"—I said, "Jean, do you mind if I pick up my contract at the office?"

He said, "Well, I gave the contract to the lawyer and I think he tore it up."

And I said, "What! He tore up the contract?" He said, "Yes."

I said, "I see no further reason for discussion."

I banged the telephone down. I said, "I will see my [139] lawyer," and banged the telephone down, and that ended that conversation with him.

- Q. On that subject, is this contract with the attached papers, the supplemental agreement and the assignment marked here Plaintiff's Exhibit 2, the same as you had loaned him the day previous on the 26th?
 - A. Yes, that is my contract—our contract.

The Court: Q. Where did it come from?

- A. From New York, sir. I brought it with me.
- Q. You said that Jean Bercut said the lawyer tore it up. A. That is right.
 - Q. Where did you get it?

A. He said he thought the lawyer tore it up. I don't know where this thing came from. It was brought in the court on the trial.

Mr. Naus: If the Court please, at the former trial—perhaps I can refresh his memory—that came from the possession of the defense, produced by us, and at the time of the production it was substituted for the original that first had gone into evidence.

The Court: Yes. I wanted the jury to understand. You said the contract was torn up. That is the original contract.

The Witness: That is what Mr. Bercut told me over the phone, your Honor.

Mr. Bourquin: Q. Did you see a lawyer then, Mr. Elman? A. Yes, I did.

- Q. On that day, the 28th? A. Yes, sir.
- Q. Whom did you see?
- A. Mr. Alfred F. Breslauer.
- Q. Who is one of the attorneys of record in this case?

 A. Yes, sir.
- Q. Did you through Mr. Breslauer make a demand on these people? [140] A. We did, sir.
 - Q. Did you get any response from them at all?
 - A. None whatsoever.
- Q. An action was commenced here for breach of the contract, I believe, on May—well, the record will show about May 25.

Mr. Naus: The clerk, if the Court please, may state the date of filing. We can settle that now if you wish.

The Court: I haven't the papers. I think my secretary has the papers.

Mr. Bourquin: I think I have a stamp-marked "File Copy," Mr. Naus.

Mr. Naus: You were asking about the date, and I was willing to agree with you forthwith on it. I will take your statement on it.

Mr. Bourquin: May 19, 1943. Will your Honor pardon me a moment, please?

The Court: Very well.

Mr. Bourquin: Mr. Naus, I wanted to produce the demand.

Mr. Naus: I will make no objection for the limited purpose of proving the demand, not to prove any statement in it.

Mr. Bourquin: For the purpose of making the demand and for the purpose of the date that the demand was made, as it shows here, I would like to offer this in evidence.

The Court: Admitted.

Mr. Naus: It makes statements of fact.

The Court: The demand has been offered and the date of the demand.

Mr. Naus: Yes, but not the truth of any statement in it.

Mr. Bourquin: Simply confining myself to that, with your permission, Mr. Naus—— [141]

Mr. Naus: Surely.

Mr. Bourquin: I will state that this demand was one addressed to Mr. Jean Bercut on the date of

April 29 demanding his contract, that being the date, and signed by Park, Benziger & Co., Inc. by Philip Elman, the vice president.

Q. Is that the demand that Mr. Breslauer prepared for you on that date?

A. That is right.

Mr. Bourquin: It will be admitted, Mr. Naus, that that demand was received that day, will it?

Mr. Naus: Oh, yes.

Mr. Bourquin: You may cross examine.

(The document was marked "Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT 9

To Mr. Jean Bercut

The undersigned, Phillip Elman of Park, Benziger & Co., Inc., hereby demands of you the return of that certain agreement dated January 29, 1943 between Pierre Bercut and Jean Bercut, doing business under the firm name and style of P. & J. Cellars, therein referred to as First Party, and Serge Hermann of Chateau Montelena therein referred to as Second Party, and which said agreement was assigned to Park, Benziger & Co., Inc.

Said agreement with attached letter and assignment was handed to you at your request on Monday, April 26, 1943 at Room 802, Chancellor Hotel, San Francisco, California, upon your statement that you wished to have your brother

read the same, and that you would return the document to me the following day, to wit, Tuesday, April 27th. I have made several oral requests for the return of this contract during the past several days and you have failed, neglected and refused to return it to me.

Will you please return this contract to me at the Chancellor Hotel, 433 Power Street, San Francisco, California, or to my attorney, Alfred F. Breslauer, Room 1333, One Eleven Sutter Street, San Francisco, California, immediately upon receipt of this written demand.

Dated: April 29th, 1943.

PARK, BENZIGER & CO., INC. By PHILLIP ELMAN Vice President

Cross Examination

Mr. Naus: Q. How soon after you slammed up the telephone, as you just illustrated to us, did you go to see Mr. Breslauer as a lawyer?

- A. Within a few hours, sir.
- Q. The same day? A. The same day.
- Q. Did you get the demand out the same day?
- A. I think so, sir. The date will establish that.
- Q. The date will only establish that it is dated April 29; I am asking you if you got the demand

(Testimony of Philip Elman.) out the same day that you slammed up the telephone on Mr. Jean Bercut.

- A. Mr. Breslauer got that demand out for me, sir. I went to him immediately after that telephone conversation, within an hour or two, after I could catch my breath, and I asked him to make a demand for the return of that contract, and I told him about what had happened to me, how we had been defrauded out of the contract.
- Q. I was only asking you about a date, Mr. Elman. A. All right. [142]
- Q. As I understood it, you went to Mr. Breslauer on the same day that you slammed up the telephone?
 - A. That is right, sir.
- Q. I see the demand is dated April 29, so I am asking if that is the date you went to Mr. Breslauer.
 - A. No, it is not.
 - Q. What day did you go?
 - A. It was the 28th, sir, the day after the 27th.
 - Q. The 28th? A. Yes, sir.

Mr. Bourquin: I might say, Mr. Naus, for your information on that subject. I intended with the Court's permission to call Mr. Breslauer on that one question.

Mr. Naus: Q. As I understood you to tell Mr. Bourquin this morning, you folks back in New York had some talk with Mr. Hermann about California wine before he left New York to come to San Francisco in January, 1943, is that correct?

A. That is right, sir.

- Q. Can you tell us about what date he left New York? He stated at the other trial, as I recall it, it was about January 5, 1943. Would that be about right?

 A. No.
 - Q. What date did he leave New York?
- A. Well, I am sorry. I say "No" advisedly. I was thinking at the moment of something else.
- Q. Did you say "advisedly" or "inadvisedly"? The Witness: May that question be read again, please?

(Question read.)

Mr. Naus: Q. Was that about the date he left New York, Mr. Elman, about January 5, 1943?

- A. The first time, sir?
- Q. On the occasion of the trip that brought him here and ended in making a contract January 29.
 - A. I imagine it was about that time.
- Q. About when was it before January 5 when he left, when was it [143] you had a talk with him about finding some wine in California?
- A. We were discussing the wine situation and that things were getting very scarce, and he said, "Well, I think with all my connections and my knowledge of the wine business, if I went to California I might be able to contact my friends out there or find some wines."

I said, "Well, that seems to be quite a good idea." Mr. Naus: Mr. Reporter, will you read the question.

(Question read.)

Mr. Naus: Q. Please note, Mr. Elman, I only asked you when, and you have answered everything else but that.

- A. Prior to that time. I can't give you the exact time.
 - Q. About how long before?
- A. It must have been within a week or two before, sir.

The Court: Q. A couple of weeks?

A. About a few weeks before he left.

Mr. Naus: Q. Who all had the talk with him?

- A. Mr. Benziger, Mr. Hermann was in the office, and myself.
 - Q. You, Mr. Benziger and Mr. Hermann?
 - A. That is right.
- Q. You have told us what he said about a proposed trip out here. What, if anything did you folks say?
- A. We said we were very much interested in buying wines, and if he found anything that had any value to it, we would be very much interested in it, because we wanted to find something with a good agency that we could continue on, on a domestic wine basis.
- Q. Was anything said at that conversation about Hermann coming out here and looking for wine, and if he could find any, to bring it to you in preference to someone else?
- A. No, he said if he found anything out here would we be [144] interested. We said yes.

- Q. When did you next hear from him?
- A. We heard from him by telegram after he had been out here for some time.
- Q. This telegram that was produced this morning?

 A. Yes, sir.
- Q. This telegram of February 2. That is addressed to you care of Park, Benziger & Company?
 - A. That is right.
- Q. It says, "Suggest you phone me on receipt of this wire." Did you do it?
 - A. No, I did not.
 - Q. Did you write to him?
 - A. Yes, I believe I wrote to him.
 - Q. Shortly after receiving the telegram?
 - A. Yes.

Mr. Naus: I ask the production of the copy of the letter or the original of Hermann's. Have you got that, counsel?

Mr. Bourquin: We will make a search, counsel, and see if we have. We will see if we can find it. I would suggest that you proceed.

Mr. Naus: I would prefer the letter at this time if it is available, so I can proceed with the examination upon it.

Mr. Bourquin: I have to give these things to Mrs. Herzig, because I am not familiar with them.

Mr. Naus: I might say, if the Court please, I had not known of this telegram until this morning. It was not mentioned at the former trial; otherwise

I would have made other arrangements about it and not held up anything.

The Court: I understand. I remember it was not mentioned at the former trial.

Mr. Bourquin: Mrs. Herzig, I might say, has not got a letter. She gives me a telegram. Would that tie in, Mr. Naus—February 8?

Mr. Naus: Q. I will hand you what I take for granted on this exchange is your first response; am I correct in that [145] assumption?

A. Maybe, sir.

Q. Is it your best recollection or not that that is your first response?

A. It is my best recollection it may be the first response.

Mr. Naus: I offer it.

The Court: It may be admitted.

(The telegram was marked "Defendants' Exhibit A.")

The Court: What is the date of it?

Mr. Naus: February 8, 1943.

Q. By the way, Mr. Elman, I notice the place it is sent from is not indicated. Did that come from New York, sent from New York?

A. Yes, sir.

Mr. Naus: (reading): From New York, February 8, 1943.

DEFENDANTS' EXHIBIT A

"Mr. Serge Hermann

Alexandria Hotel

Los Angeles, California

Congratulations. Deal looks excellent. Am awaiting samples. Airmailing letter to you tonight.

PHILIP ELMAN,

Park, Benziger & Co., Inc."

- Q. Pursuant to that telegram did you send him an air mail letter that same night?
- A. No, I think it was within a matter of a few days, I believe.
 - Q. One was sent, was it?
 - A. I think so.

Mr. Naus: I ask for the production of it.

Mr. Bourquin: Mrs. Herzig says she has not a copy of the letter, Mr. Naus.

Mr. Naus: Q. Where is the letter, Mr. Elman?

- A. I don't know, sir. It must be back in our files if it was sent.
- Q. If it was sent. Are you in doubt whether you sent a letter? [146]
- A. We had a telephone conversation, as best I can recall on the matter, while Mr. Hermann was here. He was quite enthusiastic about it. He might have phoned. As a matter of fact, I think he did phone once on it.

Mr. Naus: I ask leave, if the Court please, to file the original of a notice to produce served by us upon counsel for the plaintiff with admission of service by Mr. Breslauer on March 4, 1944, just to establish that.

(To Mr. Breslauer): Mr. Breslauer, that was served on you, and the call No. 9 in this notice to produce reads: "All correspondence between the plaintiff and Serge Hermann with relation to any transaction with the defendants Bercut relating to wine," and so on.

Mr. Bourquin: Don't you think you had better address that to Mrs. Herzig or me so we can answer it orderly?

Mr. Naus: I will address it to all of you. Gentlemen and lady, did you pursuant to this notice to produce search for the documents called for, and are you prepared to say whether they exist or not?

Mrs. Herzig: Yes, we did try to obtain all the documents which you listed, Mr. Naus. Unfortunately, the parties had already left New York and they brought with them only such things as they thought were relevant.

Mr. Naus: I will pass that for the moment.

Q. Mr. Elman, as you sit there have you or not any recollection whether, before Mr. Hermann's return to New York, which I understood you this morning to say landed him there February 15, did you or not write any letter to him? Have you any recollection?

A. I believe I did.

- Q. And that letter, if in existence anywhere now, is in New York [147] and not in San Francisco; is that correct?
- A. It probably is. I brought out quite a bit of things that were in the files. It is there or in our attorneys' files. I don't recall every letter that was brought out.
- Q. They tell me now it is not in the files in their possession. You say you turned everything over to them, so we can assume it is now in New York?
 - A. We may assume that.
 - Q. What did you say to him in it?
 - A. I beg your pardon?
 - Q. What did you say to him in it?
 - A. I don't recall what the letter said.
- Q. Could you recall any part of the substance of anything you said to Hermann in that letter we are talking about?
- A. No, sir, not without first seeing it—if there was a letter that I wrote.
- Q. If there was one. Did you receive any letter from him between February 2 and February 15 of 1943?

 A. We may have; I don't remember.

Mr. Naus: I ask the production of such a document.

Mrs. Herzig: No, I do not find the letter at that time.

Mr. Naus: Q. Then you do not know at the moment whether one was ever received from him or not? A. That is right.

- Q. In this telegram from him, Plaintiff's Exhibit No. 1, he says, "Have definitely completed the finest bottle deal dreamed of." As between you gentlemen in the wine business, what does a "bottle deal" mean?
- A. Well, it was clarified to us—I mean, after he had completed the deal—that this merchandise was racked and stored in a warehouse. A bottle deal meant it was bottled and not in bulk. There is a differentiation between purchases and sales in bulk and that in bottles. That is evidently what is referred to in here. [148]
- Q. It went on—on February you received this: "The finest bottle deal dreamed of." You understood him to refer to wine in bottles? A. Yes.
- Q. As I understand it, he arrived back in New York about February 15; am I correct in that?
 - A. That is right, sir.
 - Q. 1943? A. Yes.
- Q. And called at your office, did he, and went over the deal with you? A. He did.
 - Q. Who were present?
 - A. Mr. Benziger and myself.
 - Q. You, Mr. Benziger and Mr. Hermann?
 - A. Yes, sir.
 - Q. State the substance of what was said.
- A. Well, Mr. Hermann came into the office and showed us the contracts and said, "What do you think of the deal?"

We read it over and said, "We really think you have something there that nobody else in this country has been able to get."

Then we discussed it. We said, "Well, we will have to send it over to our lawyers and see how it shapes up from that particular aspect of it." We were satisfied in so far as the quality of the merchandise was concerned by what the contract had in it, by what Mr. Hermann had told us, by virtue of the fact that these wines were stored and racked and they had 27,000 cases of merchandise in the warehouse already prepared and labeled and ready to be shipped. And we discussed at that time the advisability of taking it. We wanted it. It was a good contract. We said, "If everything shapes up all right, just send it over to the lawyers' for o.k. and we will take it."

- Q. When did you tell him definitely you would take it?
- A. After we saw the contract we said, "Whatever comes back from the lawyers is all right."

[149]

Q. I think you misunderstand me. I don't know when it came back from the lawyers. I wasn't there. When did you tell him definitely you would take it?

A. At that time.

Mr. Bourquin: I think he has answered the question, your Honor.

The Court: Overruled.

Mr. Naus: Q. I do not think you quite understand me. You told him on February 15 you were going to submit the matter to some lawyers?

- A. I told him we would take it if the lawyers found it all right.
 - Q. When? When? A. That date.
- Q. Did you get word from the lawyers on the same day, too?
 - A. It was within a day or so, as I recall.
- Q. What I am trying to find out, Was it on February 15 or not, after getting word from the lawyers, you told Hermann you would take the deal?
- A. Yes, it could have been, because he came back a little sooner than that, as I recall it. We discussed the matter of the contract with him a little before that. I think he came in two or three days before the 15th, and it was definitely decided we wanted it on the 15th, and we all agreed we would take it. We were all in the office there, and we said, "O.K., Mr. Hermann, we will take this contract over."
- Q. Was anything drawn up in writing at that time?

 A. With reference to what, sir?
- Q. With reference to taking over the contract from Mr. Hermann. A. No.
 - Q. Why not?
- A. It was an oral acceptance to him. He was perfectly satisfied with it.
 - Q. Then what in substance were the terms on

(Testimony of Philip Elman.) which you told Hermann orally that you would take it over? [150]

- A. We discussed the matter thoroughly with him and we agreed to take over the contract and give him fifty per cent commission of the net profits on the sale of the merchandise.
 - Q. What did he agree to do?
- A. Well, he agreed to sell us the contract for that.
- Q. Was anything said about Hermann giving his time to selling the wine after you got it?
- A. Yes, he asked us whether we would like to have him promote and sell the wines, and we said, "Yes, it might be a very good idea," since he knew, I thought, a lot more about the actual wines than we did at that time. I hadn't seen them. He seemed to know the people quite well, thought very highly of them, and he asked us whether we would like to do that, discuss that point, and we said, "Yes," and we decided he was to become an employee of Park, Benziger & Company as our salesman to sponsor the wine and sell it and promote it, help in it in every way he could.
- Q. You said he was to become your employee. Was he to become a full-time employee and sell this Bercut wine?
 - A. A salesman for us to sell the Bercut wine.
- Q. My question goes further: Was he a full-time employee or salesman for you selling the Bercut wine?

 A. Yes, I imagine so.

- Q. Let us not imagine. You were present when the deal was made. Tell us whether that was the arrangement or not.
 - A. That was my impression of it, sir.
 - Q. I beg your pardon?
 - A. That was my impression of it.
 - Q. You were present? A. I was.
 - Q. You participated in the talk, didn't you?
 - A. That is right.
 - Q. And you heard everything Hermann said?
 - A. Yes. [151]
 - Q. Everything that you folks demanded?
 - A. That is right.
- Q. Was the arrangement or not that he was to give his full time to selling the wine after you got it from the Bercuts?
 - A. Yes, he would give his full time to it.
- Mr. Naus: This morning, Mr. Bourquin, it was understood that as to this Plaintiff's Exhibit 4 that went in this morning, Mrs. Herzig by two o'clock was to ascertain whether you have the original. Have you it?
 - Mr. Bourquin: No, we do not have that.
- Mr. Naus: Q. This went in in the course of your testimony, Mr. Elman, Plaintiff's Exhibit 4 (handing document to witness).
 - A. That is right.
- Q. That seems to be on the letterhead and dated February 25, 1943. A. That is right.

- Q. Is that a writing confirmatory of the oral arrangement of February 15? A. Yes.
- Q. Before going on with this, after you completed your deal orally why did you change your mind a few days afterwards and put it in writing?
- A. It was a natural course of events with us. We complete deals orally and later on they are taken out and written up.
- Q. In other words, the explanation is, as I understand it, that is according to the natural course of events in the New York office of Park, Benziger & Company; have I got it right now?
 - A. I think so.
- Q. As part of the natural course of events there was another writing on the same day, wasn't there? That is the top paper on this Plaintiff's Exhibit 2 in the nature of an assignment from Chateau Montelena of New York to Park, Benziger & Company; is that correct?
- A. That is the time we reduced all these [152] things to writing. That is right, sir.
- Q. Let us see if we have all these things. Are the two writings before you, that is to say, the fifty per cent arrangement with Hermann in one paper and the assignment from Chateau Montelena of New York to Park Benziger & Company in another paper—do those two papers comprise the whole?
 - A. The whole of what, sir?
- Q. The whole of your arrangement as it was reduced to writing? There may be three or four

more papers, so far as I know. I am trying to find out. A. I think so.

- Q. Those two papers are the whole arrangement, are they?

 A. I think so.
- Q. Do the two of them together depart in any way from the oral arrangement, or do they state the substance of the oral arrangement in writing?
 - A. I think they state it.
 - Q. There was no change?
 - A. I don't think so.
- Q. I notice in the assignment it says, "As per our agreement we hereby assign to you the agreement and all our rights thereunder." Did Park, Benziger & Company ever at any time in any writing assume or agree to buy the wine from the Bercuts?

 A. What is that?

Mr. Bourquin: What is that question? (Question read.)

A. I think so, and the fact that we had told Mr. Hermann on February 15 to write the Bercuts and tell them we were taking the contract.

Mr. Naus: Q. Returning to my question for a moment, I am trying to find out whether or not there ever was in writing——

- A. That is a writing.
- Q. I am not finished. (continuing) ——whether there ever was in [153] writing as between you folks on the hand and Hermann or Chateau Montelena of New York on the other a written assumption or agreement on the part of Park, Benziger

(Testimony of Philip Elman.) to perform Hermann's obligation under the Bercut contract, that is to say, to buy the wine.

- A. Well, Mr. Hermann's letter told Bercut that we had taken over the contract. You mean a notice of an assignment?
- Q. See if I can cover it this way: When you say Mr. Hermann's letter, is or is not the letter that you refer to the one that has been marked by the clerk here this morning as Plaintiff's Exhibit 3?

 A. That is it.
 - Q. That is the one signed "Serge," isn't it?
 - A. That is right, sir.
- Q. Has there ever been any writing on which Park, Benziger's signature can be found in which Park, Benziger & Company ever agreed in writing to buy anything from anybody?
- A. I don't know what you would think of it. Here Serge wrote the letter on Park, Benziger's stationery, and the letter contains the information stating it is being turned over and that he turned it over to us. That is about the only one I know of, sir.
- Q. If we all read this letter of February 15 that we have in our hands here, Plaintiff's Exhibit 3, we will then have the full extent of anything that was written on this subject by Park, Benziger agreeing to buy wine, will we?
- A. Also a few other letters which have been written after that date to the Bercuts, and I guess you will have it.

- Q. I am asking only about writings over the signature of Park, Benziger & Company in which they promised to buy wine or agreed to buy wine or assert the obligation of Chateau Montelena of New York to buy wine. I am trying to find out if there is any [154] writing of that nature. Can you tell me if there is or not?
- A. I don't know in that respect. There has been correspondence back and forth between the Bercuts and ourselves in which we had purchased several thousand cases of Chianti wine before there was ever any shipment of Bercut, P. & J. wines, which we bought from them.
- Q. Those Chianti wines simply took the form of a written order: they were simply orders on open account, weren't they, without previous written contract between the parties?
- A. Well, Mr. Hermann offered them to us when we came back to New York. He said the Bercuts had certain wines for sale. We bought them and sent out the orders to them.
- Q. For example, like was annexed to this letter of February 15, there was attached to it one paper called Order No. 1?

 A. That is right.
 - Q. Another Order No. 2?
 - A. That is right.
- Q. Hermann simply sent along with his letter to the Bercuts two orders on open account, or two open orders from Park, Benziger & Company to the Bercuts to ship some Chianti; is that correct?

- A. That is right. Those are orders we made up buying wine which he offered us.
- Q. That Chianti had nothing to do with the wine in the contract between Chateau Montelena of New York and the Bercuts? A. That is right.
 - Q. It was outside of that? A. Yes.
- Q. When Hermann first left New York somewhere in the early part of January, which we are assuming was around January 5, 1943, he left on his own account and at his own expense, didn't he?
 - A. That is right, sir.
 - Q. It was a matter of his own?
 - A. Yes, sir. [155]
- Q. Park, Benziger did not promote that trip or put up any money, did they? A. No, sir.
- Q. That was solely and entirely a promotion of Hermann's own, wasn't it?

 A. Yes, sir.
- Q. Later on, shortly preceding your trip to San Francisco, which landed you here somewhere around the middle of April 1943—shortly preceding that Hermann had come out here again, hadn't he?
 - A. Yes, sir.
- Q. Was that second trip of his that landed him ahead of you here in April also at his own expense?
 - A. That is right.
 - Q. A matter of his own—correct? A. Yes.
- Q. Incidentally, in that fifty per cent arrangement you had with him, first orally and later in writing, Hermann going around selling was to be at his own expense, wasn't it?

 A. That is right.

- Q. Any and every expense, of whatever nature, he may have incurred from the beginning, January 1943, down to the present time has been an expense of his own?

 A. That is right.
- Q. And is directed solely by him so far as Park, Benziger is concerned towards Hermann's attempt to make fifty per cent of the wine deal?

A. I don't quite understand that question.

Mr. Naus: May I have it read?

(Question read.)

Mr. Bourquin: I object to that, your Honor, as argumentative.

The Court: Reframe it.

Mr. Naus: Q. Mr. Elman, as I understand it, whatever personal expense Hermann was put to running around over railroads, in hotels, undertaking this, that or the other thing, in getting a wine contract with the Bercuts in the first place, and then [156] thereafter going around and finding customers for Park, Benziger & Company to buy the wine from Park, Benziger & Company—every expense of every nature that he was put to was his own expense?

A. That is very confusing, sir, because we had an arrangement with him on commission where whatever monies he spent in the promotion, towards the promotion of the Bercut wines was spent of his own account and not ours. He was to get fifty per cent of our net profits after our deductions for (Testimony of Philip Elman.)
various other—for various expense of the business
taken off.

- Q. After your deductions on everything excepting Hermann's fifty per cent, isn't that correct?
- A. No, no. Wait a minute. That is rather confusing.
 - Q. I will reframe it.
- A. We gave Mr. Hermann a fifty per cent net commission on the sale of the Bercut wines. That was the arrangement. Now, in so far as expenses are concerned, after we took the contract and he came to work for us as a salesman to promote the wines in that deal, then the monies that he spent in the promotion for it was for his own account.
 - Q. Yes. A. That is right, after that.
- Q. Yes, for his own account. Now, you gave Hermann fifty per cent of an amount that was to be arrived at how?
- A. After the deduction of freight and the costs involved in the marketing of the wine.
- Q. Well, let's see. You take the price paid to the Bercuts?

 A. That is right.
- Q. You take your transportation charge or landed cost in New York? A. That is right.
- Q. And then to those items you would add some others?

 A. That is right. [157]
- Q. And having got through with that you would subtract it from your sales proceeds?
 - A. That is right.

- Q. What all would you add to the price of the Bercuts, to the freight or landing cost in New York, before you found out what sum there was, if any, for Hermann's fifty per cent to operate on? That is what I am trying to get at.
- A. Do you mean the items of cost that entered into it?
- Q. I have never been connected with Park, Benziger & Company. I am only trying to find out from you who participated in that deal, if there ever were any profits to be divided up, how you were to arrive at the amount that you were finally to divide by two and give Hermann half of it. Whatever it was, you would have to tell me what it was. I can't answer any questions for you.
- A. The actual expenses involved in the sale of the wine, the net proceeds were to be—fifty per cent of which was to be given to Mr. Hermann.
- Q. What were those actual expenses to consist of?
- A. Your freight from Los Angeles—from San Francisco to New York is a deductible item off the sales price; the warehousing in New York and overhead in New York for the sale of that wine, which would range about six per cent of the retail business, and that is about the figures. Then we would detract the cost of the wine from that. You would have the difference, the net profit.
- Q. As I understood some of your answers, you are suggesting, at least, that Hermann was simply

an employee or was to be an employee or commission salesman for Park, Benziger & Company?

- A. That is right, in the sale of these wines.
- Q. Yes, and I assume if that were so, that whatever you paid Hermann, whether you call it fifty per cent or not, would simply [158] be selling expense of your own—selling expense of Park, Benziger & Company, wouldn't it?

Mr. Bourquin: Your Honor, I object to this as argumentative.

The Court: It seems to me it is argumentative.

Mr. Naus: I will withdraw it, then, because I do not wish it to be.

- Q. Now, Mr. Elman, tell me: You say that you finally got an artist, a printer and what-not, and prepared some labels?

 A. That is right.
- Q. I understand, of course, under the contract you folks were to furnish the labels?
 - A. Yes, sir.
- Q. Didn't you have any label that you had used before you ever heard of the Bercuts?
- A. Oh, we have many labels that we have used. We have been in the business since repeal. We have used many thousands of labels. We have sales agencies for brands in this country of Scotch whisky, French cognac, French champagnes, French wines, Hungarian brandy. We have other labels.
- Q. Have you any label that you had ever used for a domestic wine?
 - A. No. We created that label for our domestic

(Testimony of Philip Elman.)
wine business—I mean specifically for the Bercut
lot.

- Q. Prior to the Bercut deal did you have any domestic wine business?
 - A. Oh, yes, a little bit; not very much.
- Q. What does "a little bit, not very much" mean?
- A. Some bulk sales and some cased goods sales, but they were in small quantities and they weren't anything based on a real wine agency such as we have in other merchandise.
- Q. Passing the bulk sales to one side, what would you say was the aggregate volume of labeled or bottled California wine that [159] Park, Benziger had ever handled before this Bercut deal?
 - A. Oh, it wouldn't run into very much, sir.
- Q. If you will only tell me how much, we will pass to something else.
- A. Yes. I don't know exactly how much it would be, because those figures will have to be compiled by our accountants.
- Q. What would be your estimate of the limit of it?
 - A. Around 15,000, 20,000, maybe 25,000.
 - Q. What? A. Dollars.
 - Q. Dollars? A. Worth of wine.
- Q. I did not know whether you meant dollars, cases, bottles, or what.
- A. You said the limit of the amount of money spent for the purchase.

- Q. What would you say was the aggregate number of cases of wine that you had ever handled, California wine, the still wine, before the Bercut deal?

 A. Bottled, do you mean?
 - Q. Yes.
 - A. Case goods? I would say around 5,000 cases.
 - Q. That had been over what period?
- A. I might be wrong on that, sir. I recall now we did have some merchandise which we had bought in cased goods from a California shipper down south, who was a bottler. It might have run into a little more—probably eight or nine thousand, 10,000.
- Q. My immediate question was that total was spread over what period of time?
- A. Oh, I would say it was over a year—a period of about a year—yes, 1942, I think. That is about the time we started to buy California wine, because our French stocks had been depleted, and we had our customers coming in constantly asking us if we could purchase wines for them, you see.
- Q. Was any of this California still wine that you are speaking of ever put out before the Bercut deal under your own label?

 A. No. [160]

Mr. Naus: As I understand it, Mr. Elman, this wine involved in that Bercut deal that Hermann dug up for you was the initiation of a new line of business in your company, wasn't it?

- A. A new line?
- Q. That is to say, having to do with California still wines under your own label. A. Yes.

- Q. And developing a market for them, wasn't it?
- A. The question of developing a market for them, the market had already existed. We had customers coming into the office for a period of a year asking us about good wines that were becoming very scarce, and knowing that anything we put out were of good quality they were interested in having us buy wine for them.
- Q. You spoke on the matter of Mr. Hermann's license. The license that was referred to in the evidence this morning is called a salesman's license, a solicitor's license?

 A. Yes.
- Q. A solicitor can operate under a solicitor's license only when he is connected with someone who has a different kind of license?
 - A. That's right.
- Q. What is that different kind of license called, Mr. Elman? A. Wholesaler's.
 - Q. Wholesaler's?
 - A. Well, it can be either wholesaler's—
- Q. Chateau Montelena of New York had a whole-saler's license for a while, too, didn't it?
 - A. Yes.
- Q. Prior to the transfer of Hermann's solicitor's license to you his solicitor's license had been under the wholesaler's license held by Chateau Montelena, of New York? A. Yes, sir.
- Q. That wholesaler's license of Chateau Montelena of New York expired February 28, 1943, didn't it?

 A. It did.

- Q. Neither Serge Hermann nor Chateau Montelena of New York, nor Mrs. Serge Hermann, who was the owner of Chateau Montelena of New [161] York, have ever had a wholesaler's license since February 28, 1943, have they?
 - A. Yes; they renewed it this year.
 - Q. Are you sure? Have you seen it?
 - A. I think so.
 - Q. Do you know?
- A. Mr. Hermann told me that he had renewed his license.
 - Q. Wholesaler's license? A. Yes.

 - Q. When did he tell you that?A. It was prior to coming here, I guess.
- Q. Well, you have come here two or three times. When did he tell you that?
 - A. Prior to this trip, I mean.
- Q. Well, about what date? Maybe we can get it more quickly and pass to something else if I ask you what date. A. Before we left.
 - Q. When was that?
- A. After the time we left. I mean, let me see now, within the last two weeks.
- Q. Where did he tell you that he had renewed his wholesaler's license?
- A. As I recall it, he told me he was renewing, or making application, at least, the Chateau Montelena was getting their license back.
 - Where did he tell you that?
 - A. I think that was in New York, sir.

- Q. Who else was present?
- A. I don't recall at the time. It was a conversation between ourselves.
- Q. Then did he tell you that he had renewed it, or that he was going to renew it?
- A. He told me Chateau Montelena was renewing their license, was renewing their license, and he expected to get it.
- Q. I will return to my original question: Can you tell me whether at any time since February 28, 1943, Chateau Montelena of New York, or Mrs. Serge Hermann, or Serge Hermann, have had any [162] wholesale license in the State of New York, one that was actually issued and in existence?
 - A. I think so.
- Q. You think so. I am saying do you know that they did?

 A. Yes, I know they did.
- Q. But you base your knowledge simply on what Hermann has told you, is that correct, what Serge Hermann has told you?
- A. Well, as a matter of fact—yes, on what he has told me, that he has a license and he is operating on that. I think he showed me a photostatic copy of that license here in San Francisco.
 - Q. That was in the last few days? A. Yes.
- Q. Whatever you have testified to in this regard, you are relying simply on what Serge Hermann told you or showed you? A. Yes.
 - Q. And nothing more than that? A. Yes.
 - Q. It is based on nothing else, is it?

- A. Nothing else.
- Q. By the way, up to April 27, 1943, had Park, Benziger & Company ever given to the Bercuts any shipping instructions for any of the wines covered by the contract?
- A. Yes. We requested a case of each of the different types of wine in the contract to be sent to us.
- Q. Those were the original samples, weren't they?
- A. No, they weren't. That was subsequent to receiving the two cases of samples from them.
- Q. You say, then, that some of the wine under this contract has been delivered to you?
 - A. They were not delivered.
- Q. What shipping instructions have you ever given to the Bercuts with respect to any of the wines covered by the contract?
- A. We asked them to ship us a case of each of these types of wine that were in the contract that he had in his warehouse.
 - Q. That is about half a dozen cases?
 - A. Six cases; six cases to be used as samples.

[163]

- Q. Aside from those six cases of samples has Park, Benziger & Company at any time given the Bercuts any shipping instructions on any of the wines covered by the contract?
- A. No, except when I came out here I was instructed by the company to make arrangements for

the first carload of merchandise to be got out of San Francisco as soon as possible, and that the car was to consist of as many cases as the Bercuts would permit us to take into the car. The ODT regulations at that time had variations in available rolling stock. You might be allowed 1500 cases or 1800 cases, but whatever the railroad delivered to Bercuts they had to bill—

- Q. You see the difficulty, your Honor. Mr. Elman, you have been relating something that I did not inquire about. All my question relates to is whether Park, Benziger & Company ever gave to the Bercuts any shipping instructions, aside from these samples.

 A. Through me.
 - Q. Did you give them the instructions on a car?
- A. Yes; I came out to tell them that we would like to facilitate the shipment of the merchandise and we wanted to get it as quickly as possible.
- Q. Tell me whom you told them to ship it to, how many cars of each type and where to ship it?
- A. Well, I told them that we wanted to get the first car out as quickly as possible to New York.
- Q. I am pressing to find out what you ever gave them in the way of specific instructions to ship a carload of such and such type, or so many cases, or what-not, to John Smith at Baltimore, or any specific shipping instructions; did you or not?
- A. I didn't give them anything in writing, if that is what you mean. It was done orally.
 - Q. I mean orally or in writing.

A. Orally, on their contract.

Mr. Bourquin: I think if Mr. Naus will examine that contract [164] he will see his people agreed to——

The Court: This is cross examination. Objection overruled.

Mr. Naus: May I now have an answer?

The Witness: To which question?

Q. Did you ever, orally or in writing, or in any manner, or any combination of manners, ever give to the Bercuts any specific shipping instructions for the shipment of this wine covered by this contract to anybody?

A. The only thing that I had done was to tell the Bercuts that we were very anxious to get the first carload of merchandise ready. There was no merchandise ready. The cases were not labeled. The cartons were not made yet, so how could I tell them where to ship it, other than that we were very anxious to get the first carload ready and out to New York.

Q. I am afraid we are going to get into an argument in a moment. What I want to know is, did you ever tell them to ship to John Smith 100 cases when the label was ready? The answer is that you never gave them specific instructions to ship any particular wine to any particular person at any particular address; is that not a fact?

A. Well, let's not get into an argument.

The Court: No, no.

The Witness: Those are the instructions I gave them.

The Court: No. Read back there several answers of this witness.

(The record was read as follows: "The only thing that I had done was to tell the Bercuts that we were very anxious to get the first carload of merchandise ready. There was no merchandise ready. The cases were not labeled.")

The Court: That is all you did, isn't it?

The Witness: Yes.

The Court: Let's have a recess for five minutes.

[165]

(Recess.)

The Court: You may proceed.

Mr. Naus: Q. Mr. Elman, I understood you to testify earlier today that in the course of some one or more of these discussions you had with one or the other of the Bercuts something was said about cleaning and polishing the bottles and putting tissue paper on them. A. Yes.

Q. Did I understand you correctly to state as to the matter of the tissue paper and the like that "We left that open more or less"? What do you mean by that?

A. I said, "It is only a matter of a few pennies; if you don't do it I will, so what's the difference?" Then we left it open.

Q. You mean you left it open as to who would pay for it?

- A. No. I said I would pay for it if they didn't.
- Q. Did you leave it open as to whether it was to do done?
- A. Yes. If he didn't want to put them on, it was a matter of a few pennies a case, why I told him I would.
 - Q. A matter of a few what, per case?
 - A. A few pennies.
- Q. Well, how much would these few pennies amount to, do you know?
- A. I don't know off-hand, but I would think it would amount to around 3 or 4 cents a case for the paper, 12 bottles in a case.
- Q. Do you know what the handling and washing would amount to per case, for washing bottles and wrapping them in tissue paper and buying the paper?

 A. I wouldn't know, sir.
- Q. You said something earlier about the availability or nonavailability of wines from the 1st of January, 1943 down to the present date. Could this line of Bercut wines be duplicated in the country?
 - A. Not to my knowledge.
- Q. The fact is it could not be; isn't that the fact? A. Yes.

The Court: What? [166]

The Witness: I said no, it could not be duplicated.

Mr. Naus: Q. You said something this morning about the big liquor and winery distributors,

like Schenley and others buying up bulk wines in California. A. Correct.

- Q. That began back sometime in 1942?
- A. In 1942.
- Q. Prior to that time much of California wines went East in bulk in tank cars to Eastern bottlers didn't they?

 A. Yes.
- Q. After the distilleries bought up the stock the Eastern bottlers went out of business, didn't they, pretty much?
 - A. Quite a number of them did.
- Q. As a matter of fact, could either you or Mr. Hermann or Mrs. Hermann, or Chateau Montelena of New York at any time since January 29, 1943, have bought an equivalent amount of California still wines in the market anywhere, regardless of ageing or bottling or racking?
 - A. I don't think we could.
- Q. You say you don't think you could. You are in touch with the market, aren't you?
- A. Well, we are never in touch with the domestic market to that point of where we could place a finger on a broker and say we could buy a particular wine from him, because we have never been in the domestic wine business.
- Q. As a matter of fact, this was a brand new venture of yours, wasn't it, the Park, Benziger & Company?
- A. Well, not a brand new venture entirely, but it was a new phase of business, yes, that's right.

We had never purchased and sold California wines to any great extent before.

- Q. You are brand new in the business as to wineries and wine generally?

 A. That's right.
- Q. Well, it was brand new to the company, in fact, this California still wine business?
 - A. Yes.
- Q. As to handling it in quantities and as a continuous line? [167] A. Yes.
- Q. You never had any experience with that before, had you?

 A. No.
- Q. From April 27, 1943 did the Park, Benziger Company ever through you or through anybody make any attempt or effort to go out in the market and bring in any substitute wines?
 - A. No; we felt it was impossible.
- Q. Well, you did not do it, because you knew you couldn't get it; isn't that correct?
 - A. I think so.
 - Q. Would you speak up, please.
 - A. Yes. I am sorry.
- Q. You couldn't get it because there was none in the market, isn't that correct? Would you speak up, please. A. That's right.
- Q. By the way, some time after April 27, 1943 did you personally arrange in any way with a Mr. Baer or a Mr. Rathjen, or both, to buy one or more cases of this very Bercut wine?
 - A. Yes, with Mr. Rathjen.
 - Q. When did you arrange that?

- A. That was several days after the 27th; around May 5, I think. He wrote me a letter. The date is on the letter, incidentally, and he wrote to the hotel.
- Q. The date is on the letter. Have you that letter here from Mr. Baer or Mr. Rathjen?
 - A. Mr. Rathjen.
 - Q. Will you produce it, please.
 - Mr. Bourquin: Yes, I would be glad to.
 - Mr. Naus: This is the first I ever heard of it.
- Mr. Bourquin: Here you are (handing document to counsel).

Mr. Naus: Thank you.

- Q. Is this the letter you referred to?
- A. That is right.
- Mr. Naus: I ask it be marked for identification.
- Mr. Borquin: Do you want to put it in evidence?

[168]

Mr. Naus: I asked that it be marked for identification.

(The letter was marked Defendants' Exhibit B for Identification.)

Mr. Naus: Q. I notice that is dated May 5, 1943. Were you in Oakland or San Francisco on that date?

- A. I was in San Francisco on that—
- Q. Pardon me?
- A. I don't recall. Was it over a week-end or was it during the week, sir?

- Q. May 5 was a Wednesday.
- A. I was in San Francisco.
- Q. You were still registered at the Chancellor Hotel then, weren't you? A. Yes.
- Q. As a matter of fact, throughout the entire time you were here from the time of your arrival, April 16, 1943, you were at the Chancellor Hotel, weren't you?

 A. Yes.
- Q. When you checked out of there you went back to New York?

 A. I went to Los Angeles.
 The Court: Did you say the Chancellor Hotel?
 The Witness: Chancellor. I went to Los Angeles from San Francisco.

Mr. Naus: Q. You left here to go to Los Angeles. Did you meet Mr. Baer while you were here on that occasion?

- A. Yes; I saw Mr. Baer several times.
- Q. Did you arrange on or after April 27 with Mr. Baer to get one or two cases of the Bercut wines on hand either through Mr. Rathjen or through some dealer?
 - A. Through Mr. Rathjen; that is right.
- Q. This letter marked Defendants' B for Identification, is that the outgrowth of your request to Mr. Baer that he would see if he could get some dealer to get a case of wine, a case or two of the Bercut wines for you?
- A. No. That was the [169] outgrowth of the conversation with Mr. Rathjen.
 - Q. Your conversation with him? A. Yes.

- Q. What date did you have that conversation?
- A. That was either the 4th or 5th of May, before this letter was sent over to me at the hotel.
- Q. Roughly, that was a week after April 27, 1943, wasn't it?

 A. About that, yes.
- Q. So it was not until a week after April 27, 1943 that you put Rathjen in motion to see if he could get a quotation for you from the Bercuts; is that correct?
- A. No. He had offered me these wines when I spoke to him, telling me of this lot of wine which was Bercut wine that had been offered to him by Mannberger about two or three weeks before, and he said it was 5,000 cases of wine. He had been down to see the wine; he described the identical wine that we purchased under contract. I said, "Harry, put it down in writing and send it over to the room in the hotel, and I will take it back to New York with me."
- Q. Did you at some time arrange with him to get a case or two of it as samples?
 - A. Yes, I asked him to get me samples.
- Q. You asked him to get you samples sometime around May 5, 1943?
- A. Yes. After that time, yes, sometime around that time.
- Q. You told him what the wine was, didn't you, without getting samples?
- A. Well, I just wanted to ascertain whether it was the same lot of wine that was sold to us under

that contract or not, whether we purchased other wine from Bercut.

- Q. Take a look at the letter here. You can see the letter itself refers to Bercut Brothers wine, can't you?
- A. Owned by Bercut Brothers. They owned other wine besides the wine which we had bought under our contract. This was [170] evidently with the Chianti—
- Q. Now, you are arguing brands, Mr. Elman. They could sell you Chianti wine without owning it at the time at all. They could act as a sort of middleman. Have you ever done that sort of thing yourself?

Mr. Bourquin: May I have the question read? (Question read.)

Mr. Bourquin: I think Mr. Naus is doing the arguing.

Mr. Naus: I was arguing back at the argument of the witness. I will put this question to you:

- Q. As you sit there speaking of wine owned by Bercut Brothers, have you any knowledge of your own that on April 27, 1943 they owned any wine whatever except that mentioned in this contract and that you saw down at the warehouse?

 A. Yes.
- Q. What other wine is it that you know they owned on April 27?
- A. Vermouth and champagne from Fruit Industries and Chianti wine which we purchased from them.

- Q. Any other?
- A. There was some brandy mentioned, I think.
- Q. That is all you know, is it? A. Yes.

Mr. Naus: That is all from this witness at this time.

Redirect Examination

Mr. Bourquin: Q. The matter about which you just spoke, I would like to have that letter—I will offer the letter in evidence. It has been referred to.

The Court: Admitted.

(The letter was marked "Plaintiff's Exhibit 10.")

Mr. Bourquin: I would like to read it. It is on the stationery of "Harry F. Rathjen Co., Importers, Wholesale Wines and Liquors, 664 Mission Street, San Francisco." It is addressed to "Mr. Phil Elman, Park Benziger & Co., New York, N. Y." [171]

PLAINTIFF'S EXHIBIT 10

"May 5, 1943

Dear Phil:

We have recently been offered a lot of Dry Wines bottled by Fruit Industries. This lot consists of about 5000 cases of 12/5ths, in the following varieties: Burgundy, Zinfandel, Claret, Sauterne, Riesling and Chablis.

As you know this is in excess of what we could use for our normal business require-

(Testimony of Philip Elman.)

ments, and it occurred to me that you might be interested.

The price quoted us was \$6.50 per case, and if you are interested at all, we would be satisfied with a commission of 50ϕ per case for handling.

This wine was quoted us by a salesman for Fruit Industries, and is owned by Bercut Bros., operators of large markets in our city, and was apparently purchased by them from Fruit Industries some time ago on speculation. It is not labeled or cased, except for the required small label stating type, producer, etc., so it would be necessary for you to supply a label approved by the FAA.

Since this merchandise was offered to us by Mr. Mamberger, of Fruit Industries over two weeks ago, you of course understand that I would have to find out if this lot is still available to me, so I can only offer it subject to my having it confirmed.

Please let me hear from you immediately on this matter.

Kindest regards,

HARRY F. RATHJEN."

Q. Mr. Elman, let me ask you this: When Mr. Hermann came out [172] to San Francisco in

(Testimony of Philip Elman.)

April, you testified this morning he came a few days ahead of you?

A. He did.

- Q. On that occasion. Will you tell us whether or not Park, Benziger asked Mr. Hermann to make that trip?

 A. Oh, yes, we did.
 - Q. They did? A. Yes.

Mr. Bourquin: I think that is all the questions of Mr. Elman at this time, your Honor.

Mr. Naus: No further questions.

SERGE HERMANN,

called for the Plaintiff; sworn.

The Clerk: Will you state your name to the Court.

A. Serge Hermann.

Direct Examination

Mr. Bourquin: Q. Mr. Hermann, you have been seated in the courtroom today, have you?

- A. I have.
- Q. Are you the Mr. Serge Hermann spoken of here in the testimony today?

 A. In the flesh.
 - Q. Your business is what, please?
 - A. I am a general wine broker.
- Q. General wine broker. Your place of business is New York?
 - A. Is at No. 48 West 48th Street, New York.
- Q. 48 West 48th Street, New York. Were you in the same business at the same place in January of 1943?

- A. In January of 1943 I was the holder of a general wholesaler's wine license in New York in addition to my brokerage business all over the country.
- Q. Well, I think Mr. Naus wants to ask you, so I will ask you, Are you a holder of a wholesaler's license at this time? [173] A. I am.
- Q. You are. Mr. Herman, I will call your attention to the contract which is here as Plaintiff's Exhibit 2. You know what I am talking about, do you?

 A. I do.
- Q. That was the contract that you and Bercut Brothers negotiated with one another in January 1943?

 A. That is correct.
- Q. By whom was the contract prepared or written?
- A. It was prepared by Mr. Evans, the general manager of the Merchants Ice & Cold Storage.
- Q. The supplemental memorandum, a copy which extends the term of delivery on this contract, by whom was that prepared?
 - A. It was also prepared by Mr. Evans.
- Q. Will you tell us whether or not in the course of your negotiations for that wine with the Bercut Brothers you told them where or with whom you expected to market the wine?
- A. On the day of the signature, or the signing of the contract, I explained to them that it was my intention to appoint a distributor in New York and have them take over the sale of that wine, and that I had particularly in mind Park, Benziger & Com-

(Testimony of Serge Hermann.) pany, subject of course to their accepting the proposition after I had explained it to them.

Q. Who did you tell that to?

A. To Mr. Evans and Mr. Peter Bercut and to Mr. Jean Bercut.

Q. That was on the date of the signing of the contract, Plaintiff's Exhibit No. 2?

A. Yes. It came up when Mr. Evans asked me what name he was to make out the contract.

Q. What was the conversation with respect to that?

A. The conversation was as follows: "I am not altogether sure as to whether Park, Benziger will take over the contract or not, because it is subject to their finding it to their liking." [174]

Q. Did they ask you in what name to make out the contract?

A. That is what Mr. Evans asked me, "In what name do you want it, to Park, Benziger, or do you want it to Chateau Montelena?" And I answered, "You might just as well make it Chateau Montelena, as I am going to submit it to Park, Benziger & Company, but send the samples to Park, Benziger & Company."

Q. Now, Mr. Hermann, you did at that time arrange for the shipping of samples to Park, Benziger; you did with them? A. Yes.

Q. Subsequently when you returned to New York you made your assignment and made arrangements for a consideration with Park, Benziger?

- A. That is right.
- Q. When you came out to San Francisco in April, when did you arrive?
- A. I arrived here several days prior to Mr. Elman. I would place that sometime around April 10, I believe, April 9. My memory may be somewhat hazy. It was about a week or ten days prior to Mr. Elman's arrival. I was waiting for him, because my hands were tied.
- Q. In the course of your arrival a week before he arrived, did you contact the Bercut Brothers?
- A. Of course. I came here representing the Park, Benziger Company. I immediately got in touch with Mr. Jean Bercut or Mr. Peter Bercut. We had conferences which were all predicated upon waiting for Mr. Elman's arrival. I showed Mr. Bercut the label that we had finally agreed upon, and he told me that he liked the label very much, and I wired to New York telling them that the label was to Mr. Bercut's liking, and kept on writing, "Please do come here, do come here, because I can't do anything without you."
- Q. After Mr. Elman's arrival were you present from day to day as the party discussed arrangements for casing and packing and shipping that wine?
- A. I was present at every conversation [175] that Mr. Elman had with the Bercuts with the exception of one.
 - Q. Which one was that?

A. The one that took place on April 27 when they called in Mr. Elman, into their office, and I waited outside.

Mr. Naus: He probably means the 26th.

The Witness: The 26th.

Mr. Bourquin: Q. You say there was a day there, the 27th or the 26th, when Mr. Elman was called in and you were asked to wait outside?

A. That is correct.

Q. How long would you say the parties were in conversation before you joined them?

A. The parties must have been in conference for about a half hour.

Q. Were you after that invited in?

A. After that Mr. Jean Bercut came out of the office and said, "Will you step in."

Q. When you went in there, will you just tell us what ensued?

A. When I came in I found Mr. Peter Bercut, Mr. Jean Bercut, Mr. Evans, and Mr. Elman. Mr. Elman spoke to me and told me, he said, "Mr. Peter Bercut and Mr. Jean Bercut seem to have some kind of complaint with regard to some transaction that you have had. Are you willing to explain it to them? I asked them in fairness to yourself to give you a chance to be heard."

I asked Mr. Jean Bercut, "Well, what seems to be all the trouble?"

He started to reply, and spoke about the Chateau Montelena, the California firm that I was repre-

senting, and I asked him, "Well, if you want to have an explanation, I will be glad to bring Mr. Baer, or call on somebody right here in San Francisco who can substantiate what I am about to say."

Mr. Peter Bercut asked me, "If it would interest you, you can call your friends anyway, but tell me now: Here is a [176] contract. Where does it say you have the right to assign that contract?"

To which I replied, "Show me where it says in that contract that I have not got the right to assign it. At any rate, what seems to be all the trouble you have now? You are doing business with Park, Benziger & Company. Everything runs smoothly, everything seems to be very, very nice. What are you objecting to?"

He answered, "We are objecting to your being in the deal."

I said, "If that is the only thing that bothers you, we can certainly arrange matters in such a manner where I will be out of it. At any rate, you are doing business constantly with Park, Benziger & Company."

He said to me, "Well, we would like to have your personal release."

I said, "Personal release?"

"Your release."

"You mean," I said, "personal release?"

He said, "Yes, your personal release. We don't want to feel that in three months or four months or five months from now you can come back per(Testimony of Serge Hermann.) sonally and ask for something and have you say

that we have to negotiate with you."

I said, "That's all right. I will be glad to give you my personal release."

It was so arranged, and the very next day we were to meet for me to give it to him.

- Q. That day when you left the office did you leave when Elman did?
- A. Yes. We left in the finest of terms. Mr. Jean Bercut invited us to supper at his home. Mr. Elman said, "Can Serge come, too?" He said, "Sure." We went to Mr. Jean Bercut's home. We had supper there. Mr. Elman danced a little [177] bit with Mrs. Bercut. That ended the evening.
- Q. Were you present the next day at the meeting of the parties?
- A. The next morning I came right down to the Merchants Ice & Cold Storage with Mr. Elman, and when we came into the office Mr. Peter Bercut was there, Mr. Jean Bercut, Mr. Evans, Mr. Elman and myself, of course. As I stepped in, at the edge of the table there were some papers that were ready, and we sat down, and Mr. Jean Bercut said, "You sign them."

I said, "Let me read it."

I looked at it. I read some kind of a document which was simply a release between the Bercut people and Chateau Montelena, and told him, "If it is a personal release, it means that, and you have absolutely nothing to do with me."

- Q. This document I have in my hand has not been introduced in this trial so far. I will show you here the document that Mr. Naus and I just conferred about, and ask you if that is the document that you were presented with for signature that day.

 A. It is.
 - Q. And if you signed it.
 - A. It is. There were five of them.
 - Q. There were five?
- A. Five of them, five pieces, and I kept on signing them, and prior to signing them I asked Mr. Elman what he thought of that. He said, "Well, it is a matter absolutely personal between you and Chateau Montelena. We have no dealings. It makes no difference to me what you do, if you sign or do not sign."

I answered, "For harmony's sake I will sign it. It makes no difference. All I am interested in is to see your dealings between Park, Benziger and yourselves run smoothly."

- Q. Did you sign?
- A. I signed the five of them.
- Mr. Bourquin: We will offer that in evidence.

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(The document was marked "Plaintiff's Exhibit 11.")

Mr. Bourquin: I would like to call attention to the terms of the instrument, if I may, please. It is entitled

PLAINTIFF'S EXHIBIT 11 "AGREEMENT"

"This Agreement entered into this 26th day of April, 1943 by and between Pierre Bercut and Jean Bercut doing business under the firm name and style of P & J Cellars in the City and County of San Francisco, State of California hereinafter referred to as party of the first part and Serge Hermann represented to be the duly authorized special representative of the Chateau Montelena of New York competent to act in its behalf party of the second part.

Witnesseth:

Whereas the parties herein referred to did on the 29th day of January 1943 execute a certain agreement containing certain terms and conditions and Whereas it is considered by mutual consent that it will be to the best interests of both parties that the said agreement be cancelled in its entirety.

Now Therefore for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid receipt of which is hereby acknowledged it is mutually agreed that all of the provisions, covenants, terms and conditions that were specified, embodied or stipulated in said agreement are hereby declared null and void and without any force or effect, in the same manner and to all intent and purposes

the same as if said agreement had never been entered into or had ever been written, and each of said parties shall be deemed to be free and clear of any and all claims, demands or obligations asserted by the one [179] party against the other from the beginning of the world to the date hereof.

In Witness Whereof said parties have hereunto set their hands this 27th day of April 1943. P & J CELLARS"

Q. Mr. Hermann, following the signing of that agreement, then did the parties, Mr. Elman and Mr. Bercut, or either of the Bercuts, hold any further conversations with respect to the wine at the time while you were present?

A. Immediately thereafter, immediately after my signing this piece of paper and me saying I would be glad to see that the atmosphere was clear, Mr. Peter Bercut excused himself and stated he was to leave for Sacramento, or some place, and he was followed by Mr. Jean Bercut. They were in the outer office for about fifteen minutes, and we were left in the office, Mr. Evans, Mr. Elman and myself. A short time thereafter, about fifteen minutes thereafter, Mr. Jean Bercut came in and sat down in front of Mr. Elman and told Mr. Elman, "Now, Mr. Elman, no more contract. We

are going to do business along different lines. We are going to give you three cars of wine at the contract price, cash."

Mr. Elman got very, very much excited and said, "What do you mean, three cars? What do you mean, three cars of wine at the contract price? We have 60,000 cases at the contract price."

To which Mr. Jean Bercut answered him, "Why, in a few months from now, you can't tell, the wine may be worth eight or nine or ten dollars."

He said, "I am not interested in the wine being worth eight or nine or ten dollars. We have a contract and expect you [180] to live up to it. Mr. Benziger sent me here to see that that contract was carried out."

Mr. Jean Bercut kept on saying, "You will get three cars," and they were both very much excited, and then Mr. Elman got up and was just about to step out and motioned to me to go with him.

As we were stepping out, Mr. Jean Bercut ran to him and said, "Why, Mr. Elman, don't get excited. There is nothing to get excited about. Peter is away now. We can straighten matters out. Everything will be all right. We don't want to have any trouble. Don't make any trouble. Everything will be all right. Let's go now to the market and look at some Chianti wine that we still have to ship for you. We are going to get the bottles that we need, and everything will be o.k."

Mr. Elman cooled down a little bit, and Mr. Jean Bercut stepped out and took us in the car and

brought me to the market, where he had a conversation with Mr. Elman with regard to making up an additional car of Chianti wine.

- Q. Did you see the Bercuts in connection with this wine?

 A. Yes.
- Q. Or did you see Mr. Elman or Mr. Bercut together on the transaction after that?
 - A. After that.
 - Q. Did you see them together on the transaction?
 - A. After this evening, Mr. Bourquin?
 - Q. Yes. A. No.

Mr. Bourquin: You may cross examine.

Cross Examination

Mr. Naus: Q. Mr. Hermann, you spoke of having a wholesaler's license at the present time.

- A. I did.
- Q. Where? In New York?
- A. In New York. [181]
- Q. When was it issued? A. This year.
- Q. When?
- A. Licenses expire in New York on February 28, and are issued on March 1, and it was issued on March 1 for the year 1944.
 - Q. March 1 of 1944? A. Correct.
- Q. On January 29, 1943 did you have a whole-saler's license?
 - A. In your own name?
 - A. In the name of Chateau Montelena.
- Q. Well, you say you had it as Chateau Montelena.

- A. Chateau Montelena is Mrs. Louise Hermann, and I had a solicitor's permit which was my own to act on behalf of Chateau Montelena, so that on January 29 I had two licenses, one of which was the wholesaler's license for Chateau Montelena under Louise Hermann doing business as Chateau Montelena, and one as Serge Hermann, general manager of Chateau Montelena of New York.
 - Q. Mrs. Louise Hermann is your wife, isn't she?
- Q. This name Chateau Montelena of New York is simply a business name that you selected for your wife as an individual to use in the wine business, isn't it?
- A. Yes. It is a trade name like P. & J. Cellars. It is no different from P. & J. Cellars. P. & J. Cellars is a trade name, and Chateau Montelena is a trade name.
- Q. Well, the Bercuts didn't put it in their wives' names. It is that different. Well, in any event, the only wholesaler's license in existence on January 29, 1943, so far as Serge Hermann is concerned, was the wholesaler's license in the name of Chateau Montelena of New York, which was a business name of Serge Hermann's wife. Have I got that correct?
- A. No, that is not correct. It was a whole-saler's license under the name of that firm, Chateau Montelena of New York, and there was a solicitor's

(Testimony of Serge Hermann.)
permit in the name of Serge Hermann representing
[182] Chateau Montelena of New York.

- Q. You say a firm. A firm indicates two or more persons.A. Then it is just a concern.
- Q. When you speak of a firm, you speak of Chateau Montelena, do you mean anybody other than Mrs. Louise Hermann?
- A. When I speak, that is just a name; I am speaking about the owner of Chateau Montelena.
 - Q. That was solely Mrs. Louise Hermann?
 - A. Yes.
- Q. Now, as a matter of fact, she personally has never done any wine buying, has she?
- A. No. She has a husband to do it for her. I was it.
- Q. The answer is, "No," she personally has never done any wine dealing; is that correct?
 - A. Yes.
- Q. In the doing of the business for Chateau Montelena, you, Serge Hermann, did the handling of the whole thing?

 A. Yes.
- Q. She left it to you to handle as you pleased and do anything you pleased with it, didn't she?
 - A. Yes.
- Q. Did your wife allow her wholesaler's license to lapse on the expiration of it on February 28, 1943?
- A. She did, but she retained a basic permit, a Federal permit, which never expired. In other

(Testimony of Serge Hermann.) words, from an interstate viewpoint a basic permit

exists, and then existed in 1943 and exists today, 1944.

- Q. If you will confine yourself to answering the question asked you we will get along.
 - A. I beg your pardon.
- Q. I am not asking you about basic permits. I am asking you about wholesaler's licenses.
 - A. Would you mind repeating the question?
- Q. Did or did not your wife let her wholesaler's license in New York lapse by expiration of time on February 28, 1943?

 A. On March 1, yes.

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- Q. Did she ever thereafter take out any other or subsequent wholesaler's license?
- A. No, not in 1943. Yes, she did. If you want me to answer it that way, I will answer, yes, she did.
 - Q. When? A. In 1944.
 - Q. March 1, 1944? A. Yes.
- Q. All right. Then from March 1, 1943 until March 1, 1944, one entire year, she was entirely without a wholesaler's license?
 - A. That is correct.
- Q. During that same year you personally were also entirely without a wholesaler's license; is that correct?
- A. No, that is not correct. I never had a whole-saler's license. I explained to you that I was a representative of a wholesale firm, and as such would

have a solicitor's license myself. In other words, you can't be holding both.

- Q. But you used the expression "wholesale firm." You mean nothing more except your wife doing business under a fictitious name?
- A. There is nothing fictitious now, Mr. Naus. When I speak about the wholesaler's license, I speak about a license that is given by the State Liquor Authority.
- Q. I think you took umbrage unnecessarily. I am speaking, referring simply to the language of the law. When a person does business under a name not his own, it is a fictitious name.
 - A. I apologize.
- Q. There is no need. I thought you just misunderstood. Well, all I am trying to find out is whether when you use the expression "wholesale firm" in your answer, whether you mean anything under the sun except your wife doing business under a fictitious name.
- A. Definitely. I mean the wholesale license given to Chateau Montelena and Louise Hermann doing business under that [184] name.
- Q. She is doing business under "Chateau Montelena"; that is all you mean?
 - A. That is all I mean.
- Q. You came out here originally in January of 1943, didn't you?
 - A. Yes, the early part of 1943.

- Q. Leaving New York about January 5?
- A. Yes, in the early part.
- Q. You came out here on your own time and at your own expense, didn't you?
 - A. At my own expense, on my own time.
 - Q. The answer is "Yes," then?
 - A. That's right.
 - Q. It was your own idea, wasn't it?
 - A. It was my own idea.
- Q. You came out here to see if you could promote or develop a lot of California wine, was that correct?

 A. Not altogether.
 - Q. What did you come out for?
- A. I had a line, a line of Chateau Montelena of California. I came here to straighten out my affairs with the Chateau Montelena of California. They had shipped me some merchandise which had not proved to be the right merchandise, and I came here to find out what I could do with the Chateau Montelena wine right here, and if that firm could not keep on supplying wine whether I could secure a new line.
- Q. That Chateau Montelena of California, that is the business that this Mr. Feldheym is connected with?

 A. Was connected.
- Q. The same Mr. Feldheym that was mentioned in these conversations of April 26 and 27?
 - A. The same Mr. Feldheym.
- Q. Well, you came out here primarily to settle a controversy with Feldheym? A. Correct.
 - Q. Did you settle it?

- A. They were in no position to settle it.
- Q. The answer is that you did not settle it?
- A. The answer is [185] I did not settle it.
- Q. Did you come out here solely to settle that controversy, or did you come out for another purpose?
- A. I came for the purpose of finding wine. I used to come to California several times a year. I have done that for the last several years. It was not my first trip to California.
- Q. Well, it is the first trip to California in which you ever attempted to buy wine for your own account, isn't it?
- A. Absolutely not, because I closed a contract with Chateau Montelena the year prior.
- Q. I asked you if that transaction between your wife under the name of Chateau Montelena of New York, that transaction, the one with Feldheym, was the first transaction in which you or she had ever sought to buy wine on your own account.
- A. That is correct. We used a wholesaler's license there, because we had that line.
- Q. Up to that time you had been simply a middleman or broker?

 A. Correct.
- Q. That Feldheym transaction with the Chateau Montelena of New York, that never involved more than a case or two at the most, did it?
- A. It only involved one carload, because they could not carry it.

- Q. Up until the time of this Bercut transaction neither you nor Mrs. Hermann, or both, had ever bought more than one carload of California wine on your own account, had you?
 - A. That is correct.
- Q. You say you were looking for some California wines that you could buy while you were here in January 1943. How long did you look for some wine that could be bought? How long did it take you to find it?
- A. I was extremely fortunate. I [186] happened to know practically every jobber and every winery in the country, and when I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry. I came up to see my friend Mr. Baer with the idea he might let me know where I could get some wine, and just by sheer accident Mr. Baer happened to know the Bercuts and happened to know that the Bercuts had put some wine away a couple of years before, and mentioned to me that due to the fact they were French that I might go down and see them and find out if something could come of it.

I went down to see the market without any hope to find wine, but as a man interested in his business and following it up, I followed—I was going to try to do what I could.

Mr. Naus: We are getting farther away from the question.

The Witness: You asked me how long I was here, how I came to secure that line of business.

The Court: Read the question, and listen to the question.

(Question read.)

Mr. Naus: Q. How long did it take you to find the Bercut wine?

A. Two weeks.

- Q. During that two weeks' period were you looking generally for wine?

 A. I certainly was.
- Q. During that two weeks' period did you find any other wines than the Bercut wine that might be available?
- A. Absolutely impossible. I looked everywhere, talked to any number of people, and sent out many personal letters, and received replies, every one the same: "We can't give you any line; we are tied up; we have no wine."
- Q. At any time since April 27, 1943 has any California still wine been available to offer you or to Park, Benziger & Company [187] on the market?
- A. They were certainly not available to Mrs. Hermann or Mr. Hermann to Chateau Montelena, because we were not seeking it.

The Court: Just a moment. Read the question. (Question read.)

The Court: Answer the question.

A. To Park, Benziger—I know about conditions in general. Definitely not.

Mr. Naus: Q. When you came out here in April of 1943 preceding by a week or ten days Mr. El-

(Testimony of Serge Hermann.)
man's arrival here, were you on your own time and
your own expense on your trip?

- A. I was at my own expense but not at my own time.
- Q. Well, would you explain what you mean by that?
- Α. I would be glad to. When we entered into an arrangement for me to represent — when the Park, Benziger Company took over the contract that I had entered into between Chateau Montelena and the Bercut Brothers, they had arranged with me that I would devote my time to helping in the sales and promotional work of the sale of those wines. The transaction was that I would get fifty per cent commission and I would be at my own expense in doing this, which accounts somewhat for the fifty per cent commission on the net profits. So when I was traveling I was naturally interested in seeing the distribution of this wine was done as best I could, and my expenses were carried by myself. I would have been amply rewarded had the contract been carried through.
- Q. Referring to Plaintiff's Exhibit 4, is that the arrangement you are speaking about?
 - A. Yes.
- Q. Was there anything further in the arrangement between you other than what is in the writing there?

 A. Not that I know of. [188]
- Q. None that you could recall at the moment. When you say that you weren't on your own time

(Testimony of Serge Hermann.) on this trip out here in April, you mean, do you, simply that you considered that under Plaintiff's

Exhibit 4 your time belonged to Park, Benziger?

A. I not only felt so, but I did it. I spent every minute of my time on behalf of Park, Benziger Company.

- Q. In other words, you came out here in January in the first instance to see if you could find some wine and promote some kind of a wine deal with Park, Benziger; you made a contract with the Bercuts, you say, on that; you entered into a deal with Park, Benziger that you had to continue giving your whole time and at your own expense, and if it turned out profitable you would split the profits. Have I stated it fairly well?
 - A. You have stated it very well.
- Q. Do you remember sending this telegram, Plaintiff's Exhibit 1, to Mr. Elman; do you?
 - A. I do.
- Q. By the way, why did you address that to him instead of Park, Benziger & Company or to Mr. Benziger?
- A. I addressed it to Mr. Philip Elman, care of Park, Benziger & Company, because I was very, very intimate with Mr. Philip Elman and I wanted him to hear the glad news first. I knew it was going to the firm, anyway. May I add, Mr. Naus, that I get lots of letters addressed to Mr. Serge Hermann, care of Chateau Montelena, and it is nothing unusual to address a certain party in a certain firm.

- Q. Since you are the author of this matter, will you explain to us the meaning in your mind of the words in this telegram, "the finest bottle deal dreamed of."
- A. It expressed exactly what I felt. I had never in my life seen as fine a lot of merchandise so nicely racked and put up, mountains of bottles, [189] as I had seen in the Bercut place, and in view of the circumstances that I knew existed in the market and the scarcity of wine, it was something unbelievable and, in fact, when I spoke to a number of people about it they hardly believed it; so when I wired I "definitely completed the finest bottle deal dreamed of," I meant to say my dream had come true, I had found a very, very fine lot of merchandise bottled along certain lines.
- Q. Do you mean to suggest that you could not find a duplicate or a substitute lot of wine in the United States?
 - A. Better men than I have tried it.
 - Q. That is not the question.

The Court: Read the question.

(Question read.)

A. No, I could not.

The Court: The jury will please remember the admonition heretofore given. I will continue the trial until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Thursday, March 16, 1944, at 10:00 a. m.) [190]

Thursday, March 16, 1943, 10:00 O'clock A. M.

The Court: The jurors are present; you may proceed.

SERGE HERMANN,

recalled;

Cross Examination (resumed)

Mr. Naus: Q. Mr. Hermann, I show you Defendants' Exhibit A, which is a carbon counterpart of a telegram of February 8, 1943, from Mr. Elman to you; you received the original, did you not?

- A. I did, Mr. Naus.
- Q. Have you it? A. Beg your pardon?
- Q. Do you still have it?
- A. Have I got the telegram?
- Q. Do you still have the original of the document that you have in your hand?
 - A. I most probably have it at home.
 - Q. Where? A. Home.
 - Q. You mean New York?
 - A. In New York, certainly.
 - Q. Is it in a file of papers, there?
 - A. It may be amongst my papers in my home.
- Q. I mean, do you keep papers filed like a business man does, do you keep them in a separate file, all matters relating to certain subjects?
- A. Not necessarily. I consider that more as a personal telegram than a business telegram.
 - Q. You notice the telegram speaks of him air-

mailing a letter to you. Did you receive such a letter from Mr. Elman?

A. I believe I did.

- Q. Do you believe you did receive it because you know that you received it, or are you just guessing?
- A. No; I would not be quite sure. I am of the impression Mr. Elman phoned me, but I could not be quite sure whether a letter was received or not. It is possible. There is every likelihood that if he says he was airmailing me a letter that he did mail a letter. [193]
- Q. Just to clear it up, I am really confused: Did you or not receive from Mr. Elman an airmail letter, pursuant to his statement in that telegram?
 - A. I say that I do not recall.
- Q. Now, I notice your telegram to him is dated February 2nd; his telegram to you is dated February 8th, six days after. A. Yes.
 - Q. I believe that was sent to Los Angeles?
 - A. That is correct.
- Q. But your telegram to him was sent from San Francisco?
- A. That is correct, immediately after the completion of the deal.
- Q. In the six days from February 2nd to February 8th had you heard from Mr. Elman, or Park, Benziger & Company, or Mr. Benziger, by either telephone, telegram, or letter?
 - A. I believe by telephone.
 - Q. Who telephoned you? A. Mr. Elman.
 - Q. When?

- A. Sometime between the 2nd and the 8th.
- Q. That is the reason I asked the question, because there are six days in that interval.
- A. I cannot recall exactly; it was the 3rd, or 4th, or 5th, it is between the 2rd and the 8th.
- Q. Tying it to some event, how soon was it that you received the telephone call from Mr. Elman, how soon was it after your telegram to him on February 2nd?
 - A. I should imagine a couple of days thereafter.
 - Q. He called you here at San-Francisco, did he?
- A. At that time I was, the 2nd or 4th, I believe in San Francisco.
 - Q. Did he call you at some hotel, here?
- A. He would have called me at wherever I stopped, either the Alexandria or the Chancellor.
- Q. Well, he would have called you where you stopped if he knew that. Had you told him where you would be?
- A. Certainly. He wired me, so he must have known where I was. He wired me at the [194] Alexandria.
 - Q. In Los Angeles? A. Los Angeles.
- Q. At what hotel were you stopping in San Francisco on February 2nd?
 - A. I believe it was the Chancellor.
- Q. Tell me the substance of the telephone call between you and him on this occasion.
 - A. "Phillip, I am happy to tell you I have closed

a very, very interesting deal with the Bercut people. They are fine people. I have bought from them about 60,000 cases of wines, of which about 27,000 cases are now bottled, racked and very, very fine condition. I have sampled the wines at the City of Paris with Mr. Verdier, found them to be very good, and made arrangements to bottle the balance of the stock for which they now have contracts with the Fruit Industries so that they will be able to complete 60,000 cases. Here is the deal that we have been looking for. We will have continuity, we will be able to get wines all the time under your own label and we should be able to develop a real nice business. I found the Bercut people very fine people. They want to cooperate with us and will give us every bit of assistance and every bit of cooperation possible." That was the substance of my call.

- Q. Well, did he say anything to you?
- A. Wait a minute. You just asked me-
- Q. I asked you the substance of the conversation.
- A. He answered, "I am very happy, Serge; I am just waiting for your contract. As soon as you come home we will be glad to discuss the entire thing." That is about all that he said.
- Q. Did you or not in that telephone call offer to give him the contract when you got back to New York?
- A. I testified that prior to my leaving New York I had already spoken—— [195]

Q. Mr. Herman, let's forget about the testimony you have given otherwise, and please answer the question.

A. What is the question?

The Court: Read it.

(Question read.)

A. I said subject to approval I would be very glad to submit it to them first.

Mr. Naus: Q. What did he say about that?

- A. He said he would be very happy.
- Q. Did you have any further telephone call or talk with him at any time after you left New York on January 5, 1943, until you returned there about February 15, 1943?
 - A. Between January 5, 1943 and what?
- Q. Between January 5, when you left New York, and February 15th, when you got back there.
- A. Not that I recall, outside of probably a couple of telegrams and a letter and a phone call.
- Q. Well, the two telegrams, are they the ones that are marked as exhibits?
- A. Yes. I recall another telegram that I sent in which I gave the details of the contract.
 - Q. A telegram sent by you to Elman?
 - A. To Park, Benziger & Company.
 - Q. About when?
- A. Around the time when the contract was completed; it must have been around the early part of February.
 - Q. When you say the contract was completed,

do you mean the signing of a contract on January 29th?

A. Certainly.

- Q. Did you keep a carbon of that telegram for your own files?
 - A. There is every likelihood I did.
- Q. That is the reason I asked the question, did you? A. Yes.
 - Q. Produce it, please.
- A. I would have it in New York. I had no reason for bringing those things. [196]

Mr. Naus: May I ask that the original be produced?

Mr. Bourquin: What is it you wish?

Mr. Naus: The telegram he now states has been sent to Elman, or Park-Benziger about or around January 29, 1943, when the contract was signed with Bercut.

Mr. Bourquin: I think that is the telegram you have.

The Court: No. It is a telegram in which he said he explained the contract in some detail.

Mr. Bourquin: We will see if we have such a document, your Honor.

Mr. Naus: I asked him whether there was any other telegram than these exhibits, and he started to tell me about this other one that is not an exhibit here yet. That is the one I was asking for. He does not seem to have his carbon here, so I am trying to find out by reference to the original.

The Court: Didn't you go through your files in New York and search out for papers relating to this case?

A. No, I didn't, your Honor.

- Q. You haven't done that at any time?
- A. I have done that at no time.
- Q. You knew the trial was coming up, didn't you?
- A. Yes, your Honor, but I presumed that plaintiff would have all those papers and I didn't see any reason why I should look up my papers and bring them over.

Mr. Naus: If I may ask a question or two while we are waiting for the production, if your Honor please.

- Q. You have been down to the plaintiff's lawyers' office, haven't you?
 - A. To the plaintiff's lawyers' office?
 - Q. Yes.
 - A. No. I have been down to plaintiff's office.
- Q. Have you been to any office, any law office in San Francisco, [197] in connection with the matter?
 - A. In San Francisco, yes.
 - Q. Yes.
 - A. To Mr. Breslauer, to Mr. Bourquin's office.
- Q. Mr. Breslauer was the lawyer who first had charge of this case for the plaintiff, is he not?
 - A. That is correct.
- Q. Knowing him to be a careful and good lawyer, I would expect him to be asking you people to show

the papers beginning with the deal. Did he ask you for any papers connected with it?

A. He didn't ask me.

Q. Did you ever turn over any to him?

A. Personally, no.

Q. Did you ever see anybody turn over any to him?

A. No.

Mr. Naus: Have you found it, Mr. Bourquin?

Mr. Bourquin: We have no such telegram; I am sorry. [198]

Mr. Naus: Mr. Elman, Mr. Bourquin has just announced that after a search they do not find the original of the telegram. By the way, may I reopen the issue and ask Mr. Elman where he sits about that telegram?

The Court: Yes.

Mr. Naus: Mr. Elman, where is the original of that telegram?

Mr. Elman: I do not know, sir.

Mr. Naus: Have you any idea whatever?

Mr. Elman: I am sorry.

Mr. Naus: I say, have you any idea whatever where it is?

Mr. Elman: It might be in our office files.

Mr. Naus: In New York?

Mr. Elman: Yes.

Mr. Naus: You say it might be?

Mr. Elman: Yes.

Mr. Naus: But you don't even know that, do you?

Mr. Elman: No.

Mr. Naus: Q. Now, Mr. Hermann, tell us what was said in it.

A. "Have completed very fine deal with Bercut Brothers, AAA-1 people, for the purchase of a lot of 60,000 cases of wine. 30,000 cases at present ready. Will be glad to give details; phone. Serge Hermann." Something on those lines.

Q. By that laconic word "phone" you requested him to telephone you?

A. I beg your pardon?

Q. By that word "phone" in the telegram you asked him to telephone you about it?

A. That is correct.

Q. Did he do it?

A. I said later on he telephoned. Those telegrams, you see, followed each other in very short time. You are speaking to me about a few days. In a few days an awful lot [199] can be done.

Q. I understand you sent this telegram about January 29, 1943; is that correct?

A. I should imagine around the 29th or 30th. I can't tell you to the day now when it was done. I know the telegram was around that date, advising the Park, Benziger people that I had concluded a very advantageous contract, which was sent to them. I gave them, naturally, in the telegram very shortly the big lines of the contract.

Q. Mr. Hermann, we are getting away from the question again. I just asked you about the date.

- A. The date is within these few days, as near as I can fix it.
- Q. Would we be reasonably safe in saying it was January 29 or 30?
- A. You would be just as reasonable in saying the 31st. I don't know. It is around those dates.
- Q. Would I be reasonably safe if I said it was January 29, 30 or 31?
 - A. I imagine so, yes.
- Q. Having telegraphed him in that way, and with that message, around those dates, why did you again telegraph him on February 2 as though he had never heard about it before?
- A. Now, the first telegram—those two telegrams practically completed each other.
 - Q. What?
- A. Were practically completing each other. I was so happy over the entire deal that I thought was so marvelous that I wired them twice.
- Q. You mean you telegraphed them the facts the first time and the enthusiasm the second time?
- A. In the first telegram I explained to them exactly what the details were, and then there was some little arrangements that had to be completed, such as that modifying sheet that we had there. When it was definitely closed I wired them. [200]
- Q. Let's see. When you say "this modifying sheet," you mean, do you not—

Mr. Bourquin: Plaintiff's Exhibit 2.

Mr. Naus: I know which one it is. I am trying to find the document. Plaintiff's Exhibit 2, attached to the contract.

- Q. You mean the letter dated February 3, 1943?
- A. Yes.
- Q. That is attached to Plaintiff's Exhibit 2?
- A. That is correct. That is correct.
- Q. In connection with any telephoning that Mr. Elman did to you after receiving your telegram of January 29, 30 or 31, if he telephoned you, did he suggest that a modification be obtained referring to vintage?

 A. Of course not.
 - Q. Why do you say, "Of course not"?
- A. Because I submitted to him the general lines. I didn't tell him anything about vintage or anything. The question of vintage was propounded by myself.
- Q. I think perhaps you misunderstood. Of course, nothing about that was stated in the telegram, but if he phoned you immediately after getting the telegram of January 29, 30 or 31, and you explained it to him more at length, he may have suggested vintage to you. Did he?
- A. No, he didn't, for the simple reason the contract was closed when I explained it to him, so there was no sense in him asking me to make any changes.
- Q. Well, but you went down and asked for the change anyway, didn't you?
 - A. Certainly, for the safety of the contract itself.

- Q. Notwithstanding the contract had been closed, you went down and asked for a modification of it on February 3?
- A. Certainly. I had been carrying on the detail without Mr. Elman, Park, Benziger, or anybody else. [201]
- Q. Up to that time it was entirely your own deal? A. Certainly.
- Q. Have you now told us all the telegrams, telephone talks and letters that passed between you on the one side and Elman, Benziger or Park, Benziger & Company on the other, between January 5 and February 15, 1943?
 - A. As far as I recall, yes.
- Q. Now, I understand in April when you and Elman separately came out to San Francisco, April 1943, you preceded Elman about a week or ten days?
 - A. That is correct.
- Q. In that period of a week or ten days that you were here alone or on your own, did you have any communication with New York, either Elman, Benziger or Park, Benziger & Company by telephone, letter or telegram?

 A. I did.
 - Q. In what manner or what form?
 - A. Both telegram and telephone.
- Q. Were there telegrams from each of you to the other, or only from you to them?
 - A. Between the two of us.
 - Q. Well, I ask the production of the carbon that

you made of your telegram and the original of the one that you received from them.

A. Mr. Naus, as far as my records are concerned, I have them all in New York. Your Honor asked me whether I had to go through the files to bring them with me, and I stated I didn't think I had to do that or it was necessary, and therefore I didn't bring those things, as far as I am concerned. So the question you ask me, from New York I have none.

Q. To have no misunderstanding about it, you are not producing them at this time because you are stating they are physically in the State of New York, is that right?

A. Yes, by all means. [202]

Mr. Naus (to counsel for plaintiff): I ask you folks for the counterpart of his file.

Mr. Bourquin: If we may peruse that, Mr. Naus. The Witness: Do you wish this, Mr. Naus (handing document to Mr. Naus)?

Mr. Naus: Yes. Thank you.

Mr. Bourquin: I have one wire, Mr. Naus, in that period. I will see if we have anything further.

Mr. Naus: I ask that this be marked for identification at the moment.

The Court: Let it be marked.

(The document was marked "Defendants' Exhibit C for Identification.")

The Court: What is it?

Mr. Naus: I will offer it and save time.

The Court: I don't want to see it. I just wanted you to say what it is. Is it a copy of a telegram?

Mr. Naus: It is a telegram, Western Union, dated Chicago, Illinois, March 25, 1943, addressed to Philip Elman, care of Park, Benziger & Company, Inc., 24 State Street, New York:

DEFENDANTS' EXHIBIT C

"Leaving 8:45 tonight train 87 San Francisco Challenger Car 871 Lower Ten Regards.
SERGE."

- Q. You remember sending that, do you?
- A. Yes, sir.
- Q. Pardon me? A. By all means.
- Q. That, then, was while you were en route from New York to San Francisco on the occasion in question, was it? A. Yes.
 - Q. You left Chicago on March 25?
 - A. That is the date, yes.
 - Q. You sent it—
- A. I am looking at it, Mr. Naus, and it says March 25, so I sent that telegram it must have been [203] March 25.
- Q. Did you come from Chicago direct to San Francisco, or around by way of Los Angeles?
 - A. Around the way to Los Angeles, I believe.
 - Q. How long were you in Los Angeles?
- A. I must have been there a couple of days—three or four days.

Mr. Naus: Mr. Bourquin, that is a telegram obviously before his arrival here. I am asking about the telegrams he says he sent while here.

Mr. Bourquin: I am sorry, but Mrs. Herzig says she hasn't them there. While I do not want to argue this matter, I think it is only fair to say naturally these people coming out from New York brought such matter as their attorneys indicated to them would be of assistance in presenting their case, and did not undertake to bring out all the records of Park, Benziger & Company, and no demand was made that would enable them to do that, if I understand the question of dates and times. Mr. Naus did serve a rather complete blank demand to produce—was it March 4, George?

Mr. Naus: Around that date; I think it was the 4th.

Mr. Bourquin: I believe—Mr. Elman can tell us—that the parties had already packed, Mr. Elman of Park, Benziger had left New York under the arrangement made, and at least they had no communication from the defendants. If these matters are vital, and counsel thinks they are, as to warrant a delay of the trial of this case, we could wire to New York and see if further records can be sent out here. But the matters he is bringing out in this cross examination—I do not see where there is any dispute about them, how they affect the issues in this case. [204]

The Court: Mr. Bourquin has made a statement. Do you wish to reply?

Mr. Naus: Why, yes, I would like to make further comments. This is not the first, this is the second, trial of this case. It is suggested that they have only brought out what they thought their attorneys wanted. I think that is pure speculation on the part of Mr. Bourquin, because this very telegram, Defendants' Exhibit C—why under the name of the sun should they be asked to bring out a telegram giving particular details of the train on which he left Chicago and nothing more, and then bring none other?

Mr. Bourquin: That was attached to something.
The Court: Gentlemen, you have both made statements now. You may proceed with the trial.

Mr. Naus: Then, as I understand it, no telegram can be found such as the witness has described sending?

Mr. Bourquin: No. Did you ask for such at the last trial? That would have given him some notice.

Mr. Naus: I thought your Honor asked us to discontinue this colloquy. I am only asking them if they can produce the documents now.

Mr. Bourquin: George, I told you I cannot produce it now.

The Court: I think the situation is clear to the jury. You may proceed.

Mr. Naus: Q. I understood you to say on direct examination, Mr. Hermann, that on the trip in ques-

(Testimony of Serge Hermann.) tion, "I came here representing Park, Benziger & Company." Do you remember that testimony?

- A. That is correct.
- Q. What do you mean by that—representing them, coming here to represent them?
- A. Under the instructions of Park, Benziger [205] to prepare all the shipping for Mr. Elman, who only had authority to see that the final arrangements be carried out. I was here solely to do preparatory work.
- Q. You recall, do you not, the paper of February 25 in here that speaks of a fifty per cent commission to you and the paper of February 25 attached to the contract by way of assignment?
 - A. I do.
- Q. Aside from those two papers is there any paper in existence or was there ever any in existence between you and Park, Benziger & Company, or between Park, Benziger & Company and Chateau Montelena of New York with respect to your relations with Park, Benziger & Company?
- A. None, except the solicitor's license, which made me a salesman for Park, Benziger.
- Q. Speaking of the license, Mr. Hermann—just to clear this up for me—I notice in Plaintiff's Exhibit 2, the contract of January 29, 1943, in describing the parties it says: "Chateau Montelena of New York, License No. WW9, with offices" and so and so in New York.

 A. Correct.
- Q. That license WW9 mentioned in the contract was what license?

- A. The wholesale wine license.
- Q. The wholesale wine license of the Chateau Montelena of New York——
 - A. I see it on the table, Mr. Naus.
 - Q. You mean the one in the other trial?
 - A. That is correct.
- Q. The contract, then, in referring to WW9 refers to this paper I have in my hand?
 - A. Yes, sir.

Mr. Naus: I offer it.

The Court: Admitted.

(The document was marked "Defendants' Exhibit D.")

DEFENDANTS' EXHIBIT D NEW YORK STATE LIQUOR AUTHORITY

Wholesale Wine License

Permission is hereby granted under Chapter 478 of the Laws of 1934, as Amended, to the License hereinafter designated, to sell Wine at Wholesale in the premises herein designated.

Fee \$458.33

Certificate Number WW-9

(Name of Licensee and Address of

Licensed Premises)

Louise Hermann d/b/a Chateau Montelena of New York

48 West 48th Street, (Room 705-A)

New York, N. Y.

County New York

(Testimony of Serge Hermann.)
(Name and Address of Owner of Building)

Albert M. Greenfield, Agent. 521 Fifth Ave., New York, N. Y. 48th St., Realization Corp., 22 E. 40th Ct., New York, N. Y.

Dated May 4, 1942

This License expires on February 28, 1943
This License shall not be transferable to any other person or to any other premises or to any other part of the building containing such licensed premises.

This License shall not be deemed a property or vested right and may be revoked at any time pursuant to law.

HENRY E. BRUCKMAN Chairman

(Seal) EDWARD J. STRODEL Countersigned

Before commencing or doing any business for the time for which this License has been issued, the said License shall be enclosed in a suitable wood or metal frame, having a clear glass space and a substantial wood or metal back so that the whole of said License may be seen therein, and shall be posted up and at all times displayed in a conspicuous place in the room where such business is carried on, so that all persons visiting such place may readily see the same.

It shall be unlawful for any person holding a

License to post such License or to permit such License to be posted upon premises other than the premises licensed or upon premises where traffic in any alcoholic beverage is being carried on by any person other than the Licensee, or knowingly to deface, destroy or alter any such License in any respect.

Ser. WW-594 Cert 3

Mr. Naus: Q. And that was the one that expired at the close——

A. At the close of February 28, like all licenses. [206]

Q. At the close of February 28, 1943?

A. 1943.

Q. At the time of finally entering into the deal between you on the one side and Park, Benziger & Company on the other, either orally on February 15 or in writing on February 25, 1943, or both orally and in writing, at that time did or did not Chateau Montelena of New York go out of the wine business?

A. They went out of the wine business at the end of February, the 28th.

Q. 1943? A. 1943.

Mr. Bourquin: May I interrupt a moment?

Mr. Naus: Certainly.

Mr. Bourquin: Would your Honor permit me to go to the telephone and let the trial proceed? Mrs.

Herzig can take care of the matter while we proceed.

The Court: Would you like a recess for five minutes?

Mr. Bourquin: I do not think it is necessary.

Mr. Naus: I am perfectly willing to recess.

Mr. Bourquin: I do not think it is necessary, your Honor.

The Court: Very well.

Mr. Naus: Q. Now, Mr. Hermann, in this Plaintiff's Exhibit 3 of February 15, 1943, which is a letter from Serge, yourself, to Pierre, meaning Bercut, in the next to the last paragraph you speak of placements in San Francisco.

A. That is right.

Q. Will you tell us what you mean by that and the purpose of it, and so on?

A. The conversation that I had with Mr. Bercut when I signed that contract was to the effect that we wanted to develop between the Bercuts and ourselves and the Park, Benziger people a continuous business. Mr. Bercut explained to me that he had entrees to the large hotels and to the large clubs here and he could effect placement of the merchandise in those large [207] hotels, in those large clubs, and send us those menus to New York, which would have been extremely helpful to the Park, Benziger for them in turn to put them in the large hotels and large clubs of New York, and this was indeed very fine cooperation.

- Q. Then, as I understand it, the whole idea was that starting out to promote this wine, if it could be gotten into good hotels and clubs in San Francisco and gotten on the menu cards, and then copies of those menu cards sent to you in New York, you could go around and have a good sales talk; is that it?

 A. By all means.
 - Q. That is all that was meant by it?
- A. That is all that was meant by it. In other words, they were going to give us all the promotional help that was desired, because it was their purpose as well as the Park, Benziger's purpose to do business not only on this contract but after the contract.
- Q. Was it your suggestion or Peter Bercut's that it be done?
 - A. The placement in the various hotels?
 - Q. Yes.
- A. At my suggestion, and agreed to by Mr. Pierre Bercut.
- Q. The objective of that was an attempt to make known something new on the market, something new that was being promoted?
- A. Not necessarily something new in regard to the wine, but the Bercut Brothers wanted to have their name on the label on the bottles, especially selected by Bercut Freres, and under those conditions they were naturally very much interested in developing the sale of the Bercut Freres for years to come.

I explained a minute ago that the Bercut people were not interested—were interested not only in this particular contract, but it was their intention to have continuity, and [208] that is really what appealed to the Park, Benziger people. It was the development of a constant business—not one for six months or a year but one for three years, four years, ten years.

Q. Then, as I understand it, up to the date of the signing of the contract on January 29, 1943, there had been no wine put out under a label or a mark "Bercut Freres"?

A. As far as I know, not. They told me they were not in the wine business.

Q. So far as you know, they never were?

A. No, I never saw the "Bercut Freres" label.

Q. You told us yesterday, if I understood it, that you kept yourself informed and in contact with wine merchants, brokers and the like who were in that field, and when you first heard about this arrangement, that you went down to the butcher shop to find them, and that is the first time that you heard of them in the wine business?

A. That is correct.

Q. Up to that time no one had heard of them in the wine business? A. No, sir.

Q. Up to that date they had never sold any wine, had they?

A. That is correct, so far as I know.

Q. Mr. Hermann, you were answering Mr. Bour-

quin about conferences on April 26 and April 27 down at the Merchants Ice office here. You spoke of signing a paper, and, as I understood it, you identified this paper, Plaintiff's Exhibit 11, as being the one signed.

A. Yes, I signed five copies.

- Q. You read that, didn't you, before you signed it? A. Very casually.
 - Q. Is the answer Yes, you read it? A. Yes.
- Q. When you read it you understood every word in it, didn't you?

 A. Every word in it. [209]
- Q. And when you signed it you knew that the word "release" is not in it, didn't you?
- A. I didn't notice that. I am no attorney. I just knew that it was a separation between the Bercuts and myself personally, and I made it very clear to them before I signed it.
- Q. When you hasten to explain you are not an attorney, do you mean to say that you never heard the word "release" until after you had seen an attorney?
- A. I have heard the word "release," but I have not been that close to see whether the word "release" was in it or not.
- Q. Take the word up here; you see up here the word "canceled," don't you? A. Yes.
- Q. "Canceled in its entirety." You can see that, can you? A. I see that.
- Q. You saw those words on April 27, didn't you? A. Yes.
 - Q. Whether or not you need an attorney to un-

derstand the word "release," every businessman knows the meaning of the word "canceled," doesn't he?

A. He does.

- Q. By the way before you signed it you observed Elman reading that paper also, didn't you?
 - A. No, sir.
 - Q. Did you say he did not read it?
- A. I didn't say I observed Mr. Elman read it. I said I read it and then I showed it to Mr. Elman after I made it clear to the Bercut people that it was definitely a matter that concerned the Bercut people and the Chateau Montelena—solely a divorce of affiliations between the Bercut people and Chateau Montelena.
- Q. Turning to another matter in that conversation of which something has been said in the testimony so far—I do not recall whether you, Mr. Elman, or both—about Jean Bercut offering only three cars of wine for cash after that cancellation [210] had been signed; you remember the reference to three cars, don't you?
 - A. The reference to three cars?
 - Q. Yes. A. Yes.
- Q. Would you inform the jury, so I can pass on, as to what quantity makes up a carload?
 - A. The quantity makes up about 1,500 cases.
 - Q. 1,500 cases?
- A. Under the present ruling where a car must be packed to visible capacity.
 - Q. In other words, under the ODT regulations

(Testimony of Serge Hermann.) you have got to fill it as full as you can; that is correct, isn't it?

- A. That is correct, to full capacity.
- Q. At the time you signed the contract on January 29 you could still load a minimum car?
 - A. If you could get them.
 - Q. If you could get them?
- A. As a matter of fact, Mr. Naus, the Park, Benziger Company had cars shipped by the Bercut people of Chianti, and they requested the Park, Benziger to increase the amount.
 - Q. So as to load it out full?
 - A. That is correct.
- Q. Do you or not know the minimum quantity upon which the railroads would move wine at a carload rate?
- A. If my recollection is right, I believe it is between 1,200 and 1,500 cases. It is dependent, Mr. Naus, upon the weight of the cases—on weight more than it is a question of cases.
- Q. We can assume generally a carload would, say, be 1,500 cases?

 A. That is correct.
- Q. And when you heard, as you say, Jean Bercut offering three carloads for cash on January 27, you would understand that to mean 4,500 cases, wouldn't you?
- A. I was so dumbfounded I wasn't figuring the amount.
- Q. Well, figure it now. Wasn't he offering you 4,500 cases [211] when he offered you three cars?

- A. He was offering three cars.
- Q. Speaking of regulations, there is an OPA ceiling mark-up on wine, isn't there?
 - A. As far as I know, yes.
 - Q. Well, you know about it, don't you?
- A. Well, as far as I know, there is an OPA mark-up on wines.
- Q. A wholesaler like Park, Benziger could not mark it up over 25 per cent of their cost, could they?
- A. A wholesaler like Park, Benziger—and again, I am not an authority on OPA matters—would have the right to determine the price according to the price that existed for a wine equivalent to the wine they were buying in March 1942.
- Q. And that was true only up to August 1943, wasn't it?

 A. I believe so.
- Q. In August 1943 their mark-up was specifically limited to 25 per cent over cost?
 - A. In August 1943.
 - Q. In August 1943, yes.
- A. If the price had already been determined prior to August 1943, if I understand it right, that was the price.
- Q. Any price determined before that had to be first approved, did it not, by OPA?
 - A. You mean prior to August 1943?
 - Q. Prior to August 1943.
- A. Mr. Naus, I am sorry, but I am no expert on OPA matters and I really don't know.

Q. I only have lingering in my recollection that at the other trial you brought in some bottles here that you bought at the Spreckels Market and other markets, and you brought along a little cash tag showing how much you paid for it, and then you took the witness chair and said you were familiar with OPA prices, and by a process of reasoning, with the mark-up backwards, you could figure what the Bercuts sold it for. Do you [212] remember that?

A. I do not.

Mr. Bourquin: I object to that as improper cross examination.

The Court: Sustained.

Mr. Naus: Q. Up to and including January 29, 1943, in your negotiating conferences with the Bercuts did you at any time state to them or tell them that if at any time in the future they should break the contract you would be unable to get any other wine to replace it?

A. Conversation of that nature never took place between us. The contract was satisfactory; we were happy with it and took it up.

Q. Let us stay with the question: Up to and including the time that the contract was signed you never gave them any notice to that effect, did you? You never gave them any information to that effect?

A. Pardon me, Mr. Naus. Do you mean signed after I brought it to them, or signed between Bercut and myself? May I have the question a little clearer?

- Q. I will reframe it. I will go a little further. The final paper that went to the final form of the contract was a paper signed on February 3, 1943, wasn't it?—that letter modifying it?
- A. Between the Bercuts and Chateau Montelena?
 - Q. Yes. A. Yes.
- Q. Up to and including the time that letter of February 3, 1943 was signed and delivered to you, had you ever informed the Bercuts if at any future time they broke the contract you would be unable to replace the wine?
 - A. We didn't even speak about it, no.
 - Q. The answer is you did not?
 - A. I did not.
- Q. While you were in San Francisco on the occasion in January 1943, the occasion when the contract was signed, did you have any [213] talk at that time with the Bercuts about the labels that were to be put on the wine?

 A. Oh, yes.
- Q. Tell us what you said would be done in that respect, how you would go about preparing the labels.
- A. We said we would have to make up a special label; we would have to have it approved by the Federal authorities in Washington, and that furthermore, we had to have the name of the producer, and that is what accounted for—that is why we asked them to put in the original sheet, "Produced by California Wine Association," so that we in

turn would have to put that same notation on the label itself, because their wines were placed in such a condition here in San Francisco that it could only be sold intrastate, within the State, and to ship it interstate we had to have a Federal label approval.

- Q. Did you tell them it would be a Park, Benziger & Company label?
- A. Oh, definitely. I told them, I said at the time should Park, Benziger & Company take over the contract it would be a Park, Benziger label.

Mr. Naus: I think that is all at this time, your Honor.

Mr. Bourquin: That is all.

The Court: Anything further?

Mr. Bourquin: Not from Mr. Hermann, your Honor. I was going to call Mr. Breslauer for a matter.

ALFRED BRESLAUER,

called for the Plaintiff; sworn.

Direct Examination

Mr. Bourquin: Q. Your name is Alfred Breslauer?

- A. Alfred Breslauer, 111 Sutter Street.
- Q. Mr. Breslauer, you are an attorney at law of San Francisco? [214] A. I am.
- Q. And have been for some several years last past, have you? A. I have.

- Q. You are also one of the attorneys of record for the plaintiff in this action, are you?
 - A. I am.
- Q. In other words, you are one of the plaintiff's attorneys representing them?
 - A. That is right.
- Q. Had you represented Park, Benziger & Company prior to April 28, 1943?
 - A. No, I had not.
- Q. I will ask you, calling your attention to the period of time when Park, Benziger's man consulted you with respect to this controversy, can you tell us when that was, what date it was?
 - A. That was April 28.
- Q. Are you clear on the date? Had you any assistance in fixing the date?
- A. The demand that I prepare, and which was served upon Mr. Jean Bercut, enabled me to fix that date.
- Q. As the day before that instrument was drawn?
- A. The day before was the first day that I had any conference with any representative of Park, Benziger, and the day on which certain telephone calls were made.
- Q. So that you did on April 28, and the day before that instrument was drawn, you were consulted by Park, Benziger's representative, were you?
 - A. That is correct.
- Q. Did you on that date communicate with any of the defendants?

 A. I did.

- Q. On April 29. And how?
- A. By telephone.
- Q. Did you speak to any of the defendants on April 28? A. I did.
 - Q. Which ones, please?
 - A. I spoke to Mr. Pierre—Mr. Peter Bercut.
 - Q. Peter Bercut? A. That is correct.
- Q. Was the subject of your conversation one related to this controversy?

 A. It was.
 - Q. Just tell us what was said between you.
- A. Prior to my telephone conversation with Mr. Peter Bercut I attempted to reach Mr. Jean Bercut.

Mr. Naus: If the Court please, he was only asked about a particular conversation, wasn't he? The Court: Read the question.

(Question read.)

A. I told Mr. Peter Bercut that I had telephoned to Mr. Jean Bercut and had had no reply to my telephone message; that I was representing Park, Benziger & Company, and Mr. Elman of Park, Benziger & Company had consulted me, and that I wanted to obtain the return of the contract which Mr. Elman of Park, Benziger & Company had loaned to Mr. Jean Bercut, and asked Mr. Peter Bercut if he could return it to me or to Mr. Elman. I told him that if he did not wish to talk to me, I would be glad to talk to his attorney; if he would prefer, I would talk directly to his attorney. He said he couldn't give me the name of his attorney, as he didn't know who his attorney

would be; that he had a number of attorneys; that he did not have the contract, and that I would have to talk to Mr. Jean Bercut about the contract. I asked him if he would have Mr. Jean Bercut call me. He said he would.

Mr. Bourquin: Q. Prior to that had you made any attempt to communicate with Mr. Jean Bercut?

- A. I had.
- Q. What attempt?
- A. I called the Grant Market and asked for Mr. Jean Bercut and left my name with the telephone operator to have him call me when he came in. [216]
- Q. Subsequent to April 28 did you receive any return or reply from Mr. Jean Bercut or anything else from Mr. Pierre Bercut?

 A. I did not.
- Q. Did you call again to the market by phone prior to your preparation of the demand, which is here in evidence as Plaintiff's Exhibit 9?
- A. I called again on the 29th, prior to the preparation of the demand. I spoke to the telephone operator and asked if Mr. Jean Bercut was there. She said no, and asked me who was calling. I gave her my name. She said, "I recognize your name. You called yesterday. I gave that message to Mr. Jean Bercut. I will give him the message again."
- Q. Did you hear anything back from him prior to your preparation and dispatch of your demand?
 - A. I did not.
- Q. Was the demand, this Plaintiff's Exhibit 9, served on Mr. Jean Bercut that day?

A. It was prepared on the 29th, and I have my files—I think I delivered it to you—which is the affidavit of a process server that it was served that day. That is my recollection now. I will have to refer to that file.

Mr. Bourquin: You will agree to that?

Mr. Naus: It was agreed to yesterday, Mr. Bourquin; you and I agreed that the demand was made in the form there and that it was made on that particular day, whereupon you stated to the jury the substance of it.

Mr. Bourquin: I wanted to cover this point raised at that time as to what action was taken on the 28th following the statement that Mr. Jean Bercut made to Mr. Elman over the telephone.

Mr. Naus: Yes.

Mr. Bourquin: Q. Mr. Breslauer, following the service of the demand did you receive any reply or communication from Mr. Bercut, from either one of the defendants or anyone on their [217] behalf?

- A. None whatsoever.
- Q. Did you make any further attempt to communicate with them?
- A. I have no recollection of any further attempt to communicate with them after the demand.
- Q. How long did you wait before you filed a complaint in this case?
- A. I think the complaint was filed within a period of a week or ten days—that is my recollection. Some time was spent in preparing the com-

(Testimony of Alfred Breslauer.) plaint and getting together the authorities and different things.

Mr. Bourquin: That is all. You may cross examine.

Cross Examination

Mr. Naus: Q. Mr. Breslauer, in other words, up to the time the complaint was filed you had not heard from the defendants; that is correct?

- A. That is correct.
- Q. And since the complaint was filed that is about equally true, isn't it? You have not heard from the defendants since?
 - A. Oh, yes, I have heard from them since.
 - Q. With respect to the demands you made?
- A. I heard from their attorney with respect to the demand, yes.
- Q. Just one more question: Up to the time you prepared this demand, and without telling me—I am not asking what anyone said to you—who all did you talk to about this case?
- A. I spoke to Mr. Elman and I spoke to Mr. Hermann—I believe that is all.
- Q. In or around that time did you speak to a Mr. Baer about it?
- A. Mr. Baer referred Mr. Hermann and Mr. Elman to my office. Mr. Baer is a client of mine.
 - Q. Mr. Ernest Baer?
- A. Mr. Ernest Baer, and I am not clear whether he came with Mr. Hermann and Mr. Elman to my

(Testimony of Alfred Breslauer.) office, or whether he telephoned to me and said they were coming over. [218]

Q. Aside from Hermann, Elman and perhaps Baer, you talked to no one else about it?

A. That is correct.

Mr. Naus: That is all.

Mr. Bourquin: That is all, Mr. Breslauer. Thank you. [219]

Mr. Bourquin: Mr. Naus asked yesterday for some communication from Park-Benziger, or further communication to the Bercut brothers on the subject of the assignment, and I now want to call your attention to this letter of March 11, which was among the records of the Clerk.

Mr. Naus: You may offer it, or I will offer it, or I will join you in an offer of it, but there is not a word in there about an assignment.

Mr. Bourquin: I will let the letter speak for itself, and I will offer it, your Honor, as plaintiff's exhibit next in order. May I read it?

The Court: Yes.

(The letter was marked "Plaintiff's Exhibit 12.")

Mr. Bourquin: It is on the stationery of Park, Benziger & Co., Inc., with their address and other letterhead information at the top, and dated March 11, 1943, New York. Addressed to:

PLAINTIFF'S EXHIBIT 12

"Merchants Ice & Cold Storage Co., Lombard & Montgomery Sts. San Francisco, Calif.

Attention: Mr. Pierre Bercut

Gentlemen:

Just a few words to let you know of the progress we have made here on the labels for your wines.

To date we have had at least ten different artists drawing of various labels from which we have selected one, sample of which will go forward to you when finished, which we believe reflects the quality of the product which we will market. We have attempted in every respect to carry out the fine reserved atmosphere of our former imported merchandise in this new label. We have attempted to make a very simple yet highly dignified label with little colorings so as [220] to have a rich consumer eye appeal of the better imported wines.

We have also attempted to Americanize the label to a point where it is readily interpreted by the consumer from its point on the shelf. There are, of course, many other details which we have exhausted before finally selecting this label, which are too numerous to mention. We feel that you will be very happy with our selection.

We fully realize that you may be very eager and anxious to start casing merchandise for shipment. We must however not lose sight of the fact that in the preparation of the labelling and packaging it is necessary to take adequate pains and time so that the ultimate product will reflect all its justifiable merits.

We further realize that it is your desire and ours to build a business on these wines to outlast present war time conditions—therefore we are proceeding with the utmost care basing our operations here on a far sighted policy. I am sure that you are cognizant of this and are willing to have the necessary time spent for producing, labelling and finishing the package.

At this writing it will be about two weeks before we can make our trip to the Coast. By that time we will have with us finished labels and we will then be able to give you shipping instructions which will start the wine moving to our various accounts.

Anticipating the pleasure of meeting you and your brother Jean personally, and with kindest personal regards from Mr. Serge Hermann, I remain,

Very truly yours, [221]

PARK, BENZIGER & CO., INC.

PHILIP ELMAN,

Vice-President."

PIERRE J. CHOLET,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you give your name to the court and jury, please?

A. Pierre J. Cholet.

Direct Examination

Mr. Bourquin: Q. Mr. Cholet, you live in San Francisco? A. Yes, I do.

- Q. What is your business, please?
- A. Wine merchant.
- Q. Wine merchant. May I ask how long you have been in the wine business?
- A. Ever since 1933 in this country, and previous to that in Europe.
- Q. Prior to 1933 in Europe. Where is your place of business in San Francisco?
 - A. 580 Market street.
- Q. 580 Market Street. How long have you been in business in California?
 - A. Since October, 1942.
- Q. Where prior to that time had you done your business in the United States?
- A. I was in the East. I had a consulting business in New York up to 1939. Then I became associated with California Wine Sales, of Lodi, California, as Gulf Coast Manager, stationed in New Orleans, and covered all the territory of Texas, Louisiana and Florida.
 - Q. That was what period, please?
- A. That was from 1939 to January, 1942; September, 1939 to January, 1942.

- Q. Prior to your entry in business in the United States, you said you had been in business in Europe, in the wine business.
 - A. Yes; my family was in the wine business.

[222]

- Q. What part of Europe, please?
- A. In Tours, France.
- Q. So you were born and raised in the wine business? A. Yes.
- Q. At the present time what is the nature of your wine business?
- A. Well, producing wine and buying wine, and shipping wine in bulk.
- Q. Are you familiar with the wine industry and the circumstances of it in California?
 - A. Yes, I am.
- Q. Were you familiar with it prior to January of 1943? A. Yes, I was.
- Q. Will you please tell us, Mr. Cholet, what was the circumstance of the wine industry, what was the situation in it in 1942 and at the opening of 1943, with particular reference to wines of the types we have spoken of here, still wine?
- A. Well, the demand for wine started to become very active in the spring of 1942, and the prices naturally started to climb, as the demand became greater, and several large whisky outfits came into the State of California and started buying wineries and accumulating inventories sometimes in the fall of 1942, I believe it was, and created a great

shortage, with the result that the majority of the bottlers of the country were without a source of supply, and started coming to California to look for new sources of supply. I was one of them. As a matter of fact, I came here in October because my partner was ill, and there was no sense of being out selling when we had no merchandise for sale. We were brokers at that time, and we were forced into the producing business because we had to get wine.

- Q. So you came to California in the latter part of 1942 to meet that situation? A. Yes.
- Q. What was the influence and the progress of the situation from October, 1942 up, on through the early months of 1943?
- A. It became much worse, because all these bottlers were here and [223] were knocking at the doors of the wineries, and the producers, every day, and getting everyone crazy, and naturally when the next one came the price had gone up a little bit and no sales had been made. That went on until the time that OPA stepped in to attempt to put a stop to the craze of price raising.
- Q. Are you familiar with the wines, or the type of wines that were the subject of the contract that is marked Plaintiff's Exhibit No. 2, Mr. Cholet? I will refer you to page 2 of that document. You might look at the specification of wine on that and answer the question, please.
 - A. Yes, I am, Mr. Bourquin.

- Q. By the way, had you ever chanced to see this particular wine, yourself? A. Yes.
 - Q. Where?
- A. I saw it first at the Merchants Ice & Storage Company, where Mr. Jean Bercut and Mr. Hermann took me, together with Mr. Pierre Bercut, and I saw the racked wine, at the popular temperature, and kept in wonderful shape, and told Hermann that he had, I believed he had made a very unusual deal.
 - Q. When was that, do you remember?
- A. That was in—that was a few days after he had closed the deal with them. I don't recall the exact date. It was probably in February of 1943.
- Q. Let me ask you, at that time and on from that period was there any market in California and San Francisco for wine of that type?
- A. There was a very active market, and there still is. As a matter of fact, it is still rather difficult, it is difficult for us, especially as wine merchants to find even ordinary wine. We have stopped looking for that class of merchandise long ago.

Mr. Naus: Mr. Bourquin, I don't like to interrupt, but I didn't understand whether your question refers—you mean a market in which any wine could be bought, or which it could be sold? I don't quite understand. [224]

Mr. Bourquin: Well, I want to know if there is any market—well, I will ask the question if there is any market.

- A. There are many people, such as ourselves, who would like to buy it, and there are many consumers who would buy a bottle directly from the liquor store.
- Q. Do you know, and did you know during the period 1943 commencing with the months of March and April and running through the year, whether wines of similar type were being bottled and sold in San Francisco and California?

 A. Oh, yes.
- Q. Do you know whether concerns were handling similar wines? A. Yes.
- Q. Will you tell us whether or not owing to the influence and demand created, as you have described, since the latter part of 1942, that there has since that time and continues up to now to be a most active market for that type of wine in California that we have ever experienced?
 - A. Yes, it has.
- Q. Do you know, Mr. Cholet, what the price reaction was to those conditions in that type of wine in the months of January, February, March, April and May, 1943?

 A. They went up in price.

Mr. Naus: May I have the answer stricken? If your Honor please, I object to any question going to the matter of price if it is designed to elicit any information as to prices at which the defendants could sell the wine in litigation as distinguished from the prices at which the plaintiff, Park, Benziger & Company, could buy the wine in the market. I object, secondly, on the ground that there is no

evidence in the record to go into the question of market or market value, at all in the face of the admission by the witnesses Elman and Hermann that there was not available to them in the market anywhere in the United States any duplicate or substitute wines. [225]

Mr. Bourquin: I would like to make two observations as to that. It might be well for me to say at this time that I do not intend by that question, I don't want the witness to understand me to say that he has the prices of these wines, or similar types of wines for that period; I only want to know from him whether or not there was a sharp up-turn in the price of wines of this type in California and San Francisco throughout between January and April of 1943.

The Court: I think the testimony already indicates that, does it not?

Mr. Bourquin: Well, if so, I only wanted to emphasize it.

Mr. Naus: I add the further ground for the objection that it is now confessed to be repetitious in form.

The Court: I think so.

Mr. Bourquin: Well, if we are all agreed that that is in the record I am satisfied, your Honor.

The Court: Well, I don't know whether Mr. Naus will agree to that, but my recollection of the testimony of this witness was that the price of wine was rising and is still rising. Isn't that right?

The Witness: A. That's right.

Mr. Bourquin: And sharply; let us say substantially.

A. Very substantially.

Mr. Bourquin: You will agree to that, Mr. Naus?

Mr. Naus: Do you wish me to be sworn? I can tell you an awful lot about it. I am willing to be sworn.

The Court: Isn't it a matter of common knowledge?

Mr. Bourquin: Your Honor, I drink very little wine, even for a Frenchman, or of French descent; I drink very little wine. I will almost confess to not drinking any. [226]

Mr. Naus: I will join in that stipulation.

The Court: All right.

Mr. Bourquin: Q. Mr. Cholet, what other wineries or concerns in California, at the time we are speaking of, commencing with 1942 and throughout the years since, have and are producing the same type of wine?

Mr. Naus: One moment. I don't know what dates you are referring to in that question.

Mr. Bourquin: January, let us say commencing with January, 1943 and run right on to date.

Mr. Naus: If the Court please, that is objected to upon the same grounds heretofore stated with reference to the other question; upon the ground that it can only relate to the question of market or market value and there must first be a foundation laid that any wine produced was available to the

(Testimony of Pierre J. Cholet.)
plaintiff or to Hermann, or to Chateau Montelena
of New York. There has been no showing of that
kind

The Court: Objection sustained.

Mr. Bourquin: That may be a question we will argue, your Honor. May I have an exception to that ruling to preserve our position?

The Court: Certainly. The evidence here shows it was Fruit Industries wine.

Mr. Bourquin: Yes, your Honor. I want to show it was a common type of ordinary type of California wine.

The Court: Well, I presume it will be admitted it was a common type of wine, will it not?

Mr. Naus: I will admit that it was any kind of wine, either Fruit Industries, or better or worse, whatever he wishes to describe it. [227]

The Court: It is ordinary wine, isn't it?

Mr. Bourquin: Yes. I want to show whether during the period we are speaking of other common, or similar types of wine are now being produced and being sold.

Mr. Naus: But that would still leave the record short of any showing that the plaintiff or Hermann had a market available to them.

Mr. Bourquin: I would like to argue the point. I know Mr. Naus has suggested a point of law in certain instructions he submitted, and interprets our code, the section from the Sales Act. I looked into the law some last night, and I would like to

argue to your Honor. I know you do not want it now before the jury.

The Court: Yes. The ruling may stand.

Mr. Bourquin: May my statement, your Honor, be considered as an offer of proof that I made?

The Court: Yes. An offer of proof of what?

Mr. Bourquin: An offer of proof, your Honor, that all types of wine, the wines like these——

The Court: Could be bought in this market. Is that it?

Mr. Bourquin: Were being produced and sold in this market in San Francisco throughout 1943 and to date, and in quantity.

The Court: Well, I think perhaps Mr. Naus would be willing to stipulate that similar wines were being produced.

Mr. Naus: Yes.

The Court: What he objects to is any sales, any proof of any sale of the wine, because, first, a proper foundation has not been laid, and, second, as I understand it, because he doesn't think it is proper proof to offer at this time under the pleadings and so forth of the case. You say we don't need to discuss those things at this time. [228]

Mr. Bourquin: Yes, your Honor.

The Court: I think his objection is good. I understand now there is no objection on the part of Mr. Naus to your statement that there is similar wine produced in California to the wine involved in this case.

Mr. Bourquin: Yes, your Honor.

The Court: That is true.

Mr. Bourquin: I want to go further.

The Court: You wish to go further and show what they were selling for?

Mr. Bourquin: Not what they were sold for by this witness, your Honor. I want to show they would be sold as fast as they could be produced, and that extends to their production throughout 1943 and right up to date, including today.

The Court: I suppose there is not any question, Mr. Naus, but what there is a great demand for California wines, as fast as they can be produced and put on the market they are sold?

Mr. Naus: If the Court please, no question that the wines are still growing, the sun is still shining on the grapes, the yare still getting the juice out of the grapes, they are still fermenting it, they are still selling the product.

The Court: And there is still a demand for the wines and wines are being sold.

Mr. Naus: Yes, but in admitting that I don't admit that either the plaintiff or Hermann or Mrs. Hermann, newcomers in the market, could come into the market and get any wine such as has been produced in California and bottled.

Mr. Bourquin: I may say, your Honor, I can understand and sympathize with Mr. Naus' position when I look at the whisky situation. I know how hard that is to obtain and they sell it [229] as fast as it can be obtained.

(Testimony of Pierre J. Cholet.)

Mr. Naus: I will stipulate with you further that they are still selling things they call whisky.

The Court: Now, gentlemen, do you want to leave the matter like this?

Mr. Bourquin: Well, I have made the offer of proof, your Honor.

The Court: Very well.

Mr. Bourquin: We have an exception to the ruling, your Honor?

The Court: Yes.

Mr. Bourquin: You may cross examine.

Mr. Naus: No questions.

HARRY F. RATHJEN,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Wil you state your name to the Court and jury?

A. Harry F. Rathjen.

Direct Examination

Mr. Bourquin: Q. Mr. Rathjen, you live in San Francisco and are in business here, are you?

- A. Yes.
- Q. What is your business, please?
- A. Wholesale wines and liquors.
- Q. Your place of business is where?
- A. Mission street, 664 Mission.
- Q. How long have you been in the business of wholesale wines and liquors in San Francisco?
 - A. Since repeal in 1934.

- Q. Yesterday here in the course of discussion of this controversy reference was made to a letter of yours that you gave to Mr. Philip Elman, of Park, Benziger & Co. That letter is in evidence. I call your attention to it. Would you peruse it, please?
 - A. I recognize the letter. [230]
- Q. You recognize the letter. The subject matter, Mr. Rathjen, would indicate that prior to the date of that letter you had been shown and had seen the wine in the Merchants Ice & Cold Storage Company of Bercut Bros., who are referred to in this letter, Plaintiff's Exhibit 10? A. Yes.
- Q. Under what circumstances, please, had you been shown or seen the wine?
- A. Well, Mr. Bercut called for me at our place of business and took me down there to show it to me.
 - Q. For what object?
- A. Well, we had shown an interest in purchasing some, and he merely took me down to show me the way it was racked, as a point of interest.
 - Q. And offered it to you for sale?
- A. He said as long as there was some available we would be able to get it.
- Q. Did he quote you prices on the wine he showed you?

Mr. Naus: I ask that the answer go out for the purpose of the objection. If the question is designed to elicit any offer to sell after April 27, 1943, I object to it on all the grounds heretofore stated in the questions put to Mr. Cholet.

Mr. Bourquin: No. I want to show, if I can—

Mr. Naus: If, on the other hand, the question is designed to elicit an offer before April 27th, it would be relevant on another point and I would make no objection. It is not clear what the question really calls for.

Mr. Bourquin: I will withdraw the question.

Q. Let's ask this, how nearly can you fix the date when the wines were shown to you and offered to you?

A. Oh, the letter is dated May.

Q. May 5th.

A. I would say it was in April.

Q. The letter says, "Over two weeks ago." Would that be about correct?

A. Approximately. [231]

Mr. Naus: That would make it about April 21st.

Mr. Bourquin: April 20th, I get.

Mr. Naus: April 21st, wouldn't it be, if I did not calculate incorrectly.

Mr. Bourquin: Q. The wine offered to you at that time, as the letter would indicate, was 5000 cases of varieties of burgundy, zinfandel, claret, sauterne, Riesling and Chablis. A. Yes.

Mr. Bourquin: That is all.

Cross Examination

Mr. Naus: Q. Have you the letter there? The date of the letter and your statement here with respect to two weeks, you subtract two weeks, would you, from May 5th, to get that date?

A. Yes, that is approximately it. I did not specify any particular date.

- Q. Yes. That is all I am trying to say. Am I correct in suggesting April 21st, I have calculated back just as anybody in the court-room could calculate it, so it would be April 21, 1943?
 - A. Two weeks.
- Q. That is before that. As of that time when had you met Mr. Elman?
- A. He happened to visit me shortly after I had seen these wines, I don't recall just when, and I spoke to him about these wines being available.
- Q. About what date would you fix it that you spoke to him about them?
- A. It just happened to coincide very closely to the date that I visited Merchants Ice there and saw the wines, a few days.
- Q. Would you say, as best you can recollect, then, that it was about April 21st, 1943, you so told Elman?
- A. It was coincident that Mr. Elman happened to come in a few days after I had seen the wines.

[232]

- Q. I know that. You have previously told us that. My question is simply this, I am trying to fix the date as to when you told Elman the Bercuts' wine had been offered you, and, as I understand it, it coincides, or was about April 21st that you so told him. Have I got it right?
 - A. That is approximately right.
- Q. You told him what wines they were, didn't you, the Bercut Bros.' wines down in the Merchants Ice & Cold Storage Company? A. Yes.

- Q. Was anyone else present at that time?
- A. No.
- Q. Well, did he say whether or not he already claimed to have already bought that very wine from the Bercuts?

 A. No.
 - Q. What did he say to you about it?
 - A. He just said he was very much interested.
 - Q. Did he ask you to do anything about it?
- A. Asked me to submit the offer in writing, and I said I would be glad to, as I already explained; I had made an offer to him verbally and he asked me to put it in writing.
- Q. To get it clear, about April 21, 1943, you bumped into Elman.
 - A. We do business with Park-Benziger.
- Q. Well, after April 21, 1943, you saw and talked with Elman? A. Yes.
- Q. On that date you made an offering of wine to him, it was verbal, and your offering was 5000 cases of wine that was in bottles?
- A. No specific figures were mentioned. I just told him that there was a large amount of wine available.
- Q. And you identified it as the Bercut Bros. wine? A. Yes.
- Q. The wine that they had down at the Merchants Ice & Cold Storage Company warehouse in bottles but not cased?

 A. Right.
 - Q. And laying on their sides in the racks?
 - A. Yes.

- Q. And that the Bercuts had had that for some time? A. Yes.
- Q. And that, as a matter of fact, anyone in the wine business knew [233] was all the wine that the Bercuts then had?

 A. Yes.

Mr. Naus: That is all.

Redirect Examination

Mr. Bourquin: Q. Mr. Rathjen, let's clear this point up. Your letter indicates that over two weeks before May 5th the wine had been offered to you, the Bercut wine, by Bercut Bros., is that correct?

- A. Yes.
- Q. When was it that you drew Mr. Elman's attention to that fact that he ascertained from you, was it at that time, or was it on the eve of the letter which he asked you to prepare and give him?
- A. Well, it was probably a few days after I had visited the wine cellars, that would make it around the 23rd or so. If it was the 21st that I visited it it would be a few days later.
- Q. You testified on the occasion of the trial of this action before, didn't you?
 - A. Yes, I was up here once before.
- Q. You testified on the same subject at that time, you recall, don't you?
- A. I don't recall whether this thing was brought up.
- Q. On that occasion did you fix the time when you drew this to Mr. Elman's attention as in May?

Mr. Naus: No, Mr. Bourquin. I think you are confusing the witness. I think on the May occasion he was speaking about something wholly different which had to do with Mr. Rathjen, the witness, at the suggestion of Mr. Ernest Baer getting from Jean Bercut two cases of assorted wines to be shipped to New York as samples, and that is all the May reference is to.

Mr. Bourquin: May I call the witness' attention to this, this is a transcript of the earlier trial, Mr. Rathjen, and I am looking at page 190. You can look at anything you want, but I want to draw your attention to this, this was Mr. Naus' cross examination. [234]

Mr. Naus: One moment. Before Mr. Bourquin starts reading, this is his own witness. Are you reading for the purpose of impeaching——

The Court: I don't think it is necessary to read it. You can show the witness the transcript. [235]

The Court: I do not believe it is necessary to read it. Show the witness the transcript of testimony.

The Witness: Well—

Mr. Bourquin: Q. I haven't asked you any question.

A. There is a difference in months there—is that what you are referring to?—the fact that May is designated there? At that time I just went by memory. I didn't have any way of determining just when it was.

- Q. At the time that you said in answer to Mr. Naus that your contact with Mr. Elman was in April, then you said in May it was when he was here, at at time you were going by memory; is that true?

 A. Yes.
- Q. What has transpired between to change your memory from that occasion in September of last year and today?
 - A. This letter is dated May 5.
 - Q. The letter is dated May?
- A. Yes, and I know I had been to the winery before that letter was written, naturally, or I wouldn't have been able to describe it to Mr. Elman, and secondly, we did know from—I am sure we did speak verbally about this wine before I wrote that letter.
- Q. Yes, but the question now has become: How long before? The last time you indicated it was within five days, and today you surprise us with a statement that you thought it was a few days after the time that you saw them, around April 20 or before.

Mr. Naus: If the Court please, I object at this point because we now very clearly have reached a very extended cross examination of his own witness.

The Court: Well, it is. I think Mr. Bourquin is endeavoring to clear the matter up, and that is all he is doing, and it seems to me the letter is the best evidence here. The letter [236] very definitely states

when this witness saw Mr. Elman—two weeks before May 5.

Mr. Bourquin: No, the letter, your Honor, says he saw Peter Bercut and the wines were offered to him over two weeks ago, in a letter dated May 5.

The Court: Yes.

Mr. Naus: If the Court please, he also testified by coincidence he saw Elman at the same time.

Mr. Bourquin: The letter doesn't say so.

Mr. Naus: You and I have the advantage over Mr. Bourquin, your Honor, because we were here at the former trial and he was not, and you will recall, and the record shows, that when Mr. Rathjen took the stand before he brought no record with him, none was shown him, and he was attempting to answer from memory offhand. What has happened during this trial is there has been produced by the plaintiff earlier in the case a letter which the witness recognizes and which itself fixes the date that he was groping for in memory before.

The Court: Q. What is your best recollection about this matter, Mr. Rathjen?

- A. I would say I would have to correct the previous testimony to April, I should say.
- Q. You think if you said May at the last trial you were mistaken?
- A. I was probably mistaken by a few days. It was probably the latter part of April.
- Q. Your best recollection is now that you saw Mr. Elman in April? A. Yes.

- Q. Around April 21, is that so?
- A. Yes, your Honor.
- Q. Did Mr. Elman call upon you?
- A. Yes, your Honor.
- Q. He called at your place of business?
- A. That is right.
- Q. Was he seeking to buy wine?
- A. We had been buying from them. [237]
- Q. Buying from whom?
- A. From Park, Benziger. We were one of their customers. We had purchased liquor from them, and he said that he was out here also looking for wines for the eastern market.
- Q. And you then told him about the P. & J. wine, did you? A. Yes, your Honor.
 - Q. And that you had been to see the wine?
 - A. Yes, sir.
 - Q. Did he tell you he knew about that wine?
 - A. He didn't say anything.
 - Q. He didn't say anything? A. No.
- Q. Did he ask you to see if you could buy 5,000 cases of this wine for him?
 - A. Yes, your Honor.
 - Q. And submit a letter to him about it?
 - A. Yes, your Honor.
- Mr. Bourquin: Just a question or two, your Honor, if I may.
- Q. This letter that we refer to here, Plaintiff's Exhibit 10, a photostat of your letter of May 5, you

did not mail that letter; you delivered that letter to Mr. Elman, didn't you? A. Yes, sir.

- Q. You delivered it because he asked you to prepare a letter reducing your information to writing so that he would have it, didn't you?
 - A. Yes, sir.
- Q. Now, then, how do you fix, with this letter or without it, your talk with Mr. Elman as two weeks before this letter and not just before the letter?

Mr. Naus: Now we are resuming cross examination.

The Witness: It mentions something there in the letter about two weeks previous.

Mr. Bourquin: May I read this letter, your Honor?

The Court: Yes, read it. [238]

(Plaintiff's Exhibit 10 was read by Mr. Bourquin.)

The Court: Do you wish to ask the witness any questions?

Mr. Bourquin: Yes.

Q. Let me call your attention to the last paragraph of that letter?

"Since this merchandise was offered to us by Mr. Mamberger, of Fruit Industries over two weeks ago, you of course understand that I would have to find out if this lot is still available to me, so I can only offer it subject to my having it confirmed."

Does that help you determine when it was you

(Testimony of Harry F. Rathjen.) talked to Mr. Elman concerning the substance of that letter?

- A. Well, Mr. Mamberger offered us this wine, according to the letter, two weeks prior to May 5.
 - Q. Over two weeks?
- A. Over two weeks, yes. Sometime in that two weeks—within that two weeks, Mr. Bercut called for me and took me down to see the wine, and sometime later on after that Mr. Elman came in and the conversation took place. I offered him some of these wines and he asked me to write a letter—make it in writing.
 - Q. Did you do it? A. Which I did.
 - Q. Then? A. Yes.

Mr. Bourquin: No further questions.

Mr. Naus: No questions.

The Court: I think we will continue the trial now until two o'clock.

Mr. Bourquin: All right, your Honor.

The Court: Remember the admonition heretofore given, ladies and gentlemen of the jury. We will be in recess until two o'clock. The jury may now retire.

(Thereupon a recess was taken until 2:00 p.m. this date.) [239]

Afternoon session, Thursday, March 16, 1943, 2 P. M.

MARCEL LUSINCHI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Marcel Lusinchi.

Direct Examination

Mrs. Herzig: Q. Mr. Lusinchi, will you please state your business?

- A. Division Merchandise Manager, City of Paris Dry Goods Company.
 - Q. How long have you held that position?
 - A. Around nine years.
 - Q. Do you live in San Francisco? A. Yes.
- Q. Now, Mr. Lusinchi, in your position have you purchased wines which have been made in the State of California? A. Yes.
 - Q. Over the last eight or nine years?
 - A. Yes.
- Q. Are you familiar with the conditions in the market on wines?
 - A. At the present time? A. Yes.
- Q. Were you familiar with those conditions in January of 1943? A. Yes.
 - Q. And throughout the year 1943? A. Yes.
- Q. Did you know about the market conditions in the fall of 1942? A. Yes.
- Q. Would you state what was happening about that time?
- A. Well, at that particular time, due to conditions in Europe, there was a shortage in this coun-

(Testimony of Marcel Lusinchi.)

try, and the market tended to rise, and there still is a shortage of California wines in the State today.

- Q. What effect did that have on the price of wines in general?
 - A. The wines started to increase in price.
- Q. Are you familiar with wines produced in California which are [240] aged in bottles?
- A. Yes. Most of the major wineries give their wines a certain amount of bottle aging.
- Q. What wineries would you say do that, in particular?
- A. Well, I would say the major wineries, Beaulieu Vineyard, Concannon, Wente Bros.
- Q. Did you know about wines which the Bercut Bros. had?
 - A. Yes, I know about those wines.
- Q. Were you familiar with the way in which they stored and racked their wines? A. Yes.
- Q. Would you say that that was in a way these other wineries have handled their wines?
 - A. As far as the bottle aging, yes.
- Q. Yes. What would you say about the prices of the Beaulieu wines during 1943?

Mr. Naus: One moment. Objected to upon the ground that the question calls for matters that are outside of the issues in this case.

The Court: Sustained.

Mrs. Herzig: Your Honor, we should like to have an opportunity to discuss that matter, and I therefore would like to suggest that the jury be excused while we—

(Testimony of Marcel Lusinchi.)

The Court: Not at this time. You may proceed. I may hear you later on that, if you wish.

Mrs. Herzig: Then may we have the opportunity to recall any witness on that point?

The Court: Yes, certainly, if I rule the other way, but I don't think I will.

Mr. Bourquin: Would your Honor permit me— The Court: We are only concerned here, are we not, with the profit as far as it related to the contract stated in the complaint? [241]

Mrs. Herzig: It is my understanding that we are concerned with the loss to the plaintiff due to the breach of the contract.

The Court: Yes.

Mrs. Herzig: And that that can be shown in a number of ways.

The Court: The loss of profits; that is the question, is it?

Mrs. Herzig: Well, I interpret loss in a more broad sense than that.

The Court: The objection is sustained; the ruling will stand. You may have an exception. Proceed. The question you asked was the price on Wente wine. We are not concerned with the price on Wente wine, or any other wine.

Mrs. Herzig: Q. Would you give us the price at which wine comparable to the Bercut wine was selling for in April of 1943?

Mr. Naus: Same objection.

The Court: Sustained.

Mrs. Herzig: Q. Mr. Lusinchi, did you partici-

(Testimony of Marcel Lusinchi.)
pate in a transaction on behalf of the Bercut Bros.,
or P. & J. Cellars, with the Utah Liquor Authority
in 1943?

Mr. Naus: If the Court please, before making an objection that I am about to make, I will inform your Honor that at the former trial this witness referred to a matter of that nature that did not occur until, as I recall, about September of 1943. Having that in mind, and knowing that that is undoubtedly what Mrs. Herzig has in mind, I object to that question also as being outside the issues.

The Court: It is outside the issues. Objection sustained.

Mr. Bourquin: Exception.

The Court: Let it be understood an exception is noted to each and every ruling of the court.

Mrs. Herzig: That is all. Have you any cross examination? [242]

Mr. Naus: No questions.

Mr. Bourquin: We will call Mr. Jean Bercut to the stand.

JEAN BERCUT,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Your name is Jean Bercut?

A. Yes.

Mr. Bourquin: If your Honor will permit me, in line with the discussion that has come up now on the question of law, may I say to your Honor that first and primarily from this witness we propose

to show as evidence of the value of these wines at the time of the successive deliveries owing under the contract the prices at which the defendants sold the same wines by way of showing as the Code section 1787 provides, the damages proximately resulting to the plaintiff from the breach of the contract. That is along the lines that Mrs. Herzig suggested to your Honor, and that we might, if your Honor disagrees with our view of the matter, we would like an opportunity to be heard further on the authorities, because, as I say, we do offer to show, as your Honor said, it is a loss of profit, but it is primarily a loss, and to show that we propose to show the value of these goods at the time of the deliveries owing under the contract.

The Court: You may proceed.

Mr. Bourquin: Q. Mr. Bercut, you are one of the defendants in the action? A. Yes.

Q. You and your brother, Peter Bercut, are associated in this particular business under the name of P. & J. Cellars, are you?

A. Correct.

Mr. Bourquin: Your Honor, may the record show that the witness is called under provisions of section 2055 of the Code of [243] Civil Procedure, with the right of the plaintiff to impeach his testimony?

The Court: Oh, yes.

Mr. Naus: If the Court please, 2055 of the State Code has no bearing on any trial in this case.

The Court: Well, we have a provision.

Mr. Naus: There is a separate Federal rule and I think it is similar to 2055.

The Court: Yes, quite similar. The provision of the Federal rule is quite similar. You may proceed.

Mr. Bourquin: Q. Mr. Bercut, calling your attention to the particular wines specified in the contract that is here in evidence as Plaintiff's Exhibit 2, namely, the 7000 and some odd cases of burgundy, 7000 and some odd claret, six thousand some odd Rhine wine, Sauterne 4000 and some odd, sherry and port, you have those wines in mind, have you Mr. Bercut?

A. Yes.

- Q. May we ask you for our record which of those wines are to be denominated or characterized as sweet and which as dry wines?
 - A. The Burgundy is dry wine.
 - Q. Burgundy is dry wine?
 - A. Sauterne is dry.
 - Q. Sauterne is dry? A. Claret is dry.
 - Q. Claret is dry. What about Rhine wine?
 - A. Rhine wine is also dry wine.
 - Q. That is also dry? A. Yes.
 - Q. The sherry is what, sweet?
 - A. Sweet wine.
 - Q. The port is sweet? A. Yes.
- Q. And they were so characterized at the time of the execution of the agreement that is referred to?

 A. Yes.
- Q. Following the month of April, and particularly the 27th day of April, 1943, did you sell those wines in the open market? [244]

Mr. Naus: Objected to as immaterial, and as being wholly outside the issues.

The Court: Sustained.

Mr. Bourquin: We may have an exception to the ruling, your Honor?

The Court: Yes.

Mr. Bourquin: Q. What was the value in the market of the dry wines specified in the contract to which I have referred, in the month of May, 1943?

Mr. Naus: The some objection.

The Court: Overruled.

The Witness: Should I answer that?

The Court: Yes. Read the question.

(Question read.)

A. Well, it should have been around \$6 a case.

Mr. Bourquin: Q. \$6 a case?

A. Yes, about that.

Q. What was the value in that month of May, 1943, of the sweet wines specified in the agreement to which I have referred?

Mr. Naus: The same objection.

The Court: Overruled.

A. About 25 cents a case higher.

Mr. Bourquin: Q. \$6.25?

A. Yes, something like that.

Q. What was the value of the same dry wines specified in the agreement referred to in the month of June, 1943?

Mr. Naus: One moment. Objected to, first, as

immaterial, and, second, as outside the issues, and, thirdly, as speaking of a market in June after an alleged election to treat the alleged repudiation on April 27, 1943 as a breach.

The Court: Sustained on the last ground.

Mr. Bourquin: May I make the same offer of proof as to the [245] value of the wines specified in the contract in the market in the succeeding months following June, 1943, and running down to date?

The Court: Yes. The ruling will be the same if the objection is the same.

Mr. Naus: The objection is the same.

The Court: Are you satisfied with that?

Mr. Bourquin: Well, I am not satisfied, your Honor—

The Court: I mean so far as what the record will disclose.

Mr. Bourquin: Well, I think if we may have a stipulation, Mr. Naus, that the same objection you would desire be offered if we offer the same question—

The Court: From June to date?

Mr. Bourquin: From June to date.

Mr. Naus: As far as it is within the power of counsel to concede or stipulate to that effect I do so.

The Court: Very well. The same ruling and exception noted.

Mr. Bourquin: Your Honor, I feel that I have encountered a ruling that perhaps to the questions to be properly put before the jury where objections

would be sustained and I have exhausted our position. I would like to make an offer of proof and I was sure that perhaps something would be made in the absence of the jury.

The Court: Well, you have suggested this method of shortening the examination and it has been accepted. Now, do you wish to pursue it further?

Mr. Bourquin: If your Honor stays with the ruling I am not able to go beyond it.

The Court: I don't know what it is you are driving at.

Mr. Bourquin: Well, then, I think I can make a statement [246] in general terms to which there would be no objection, without mentioning the prices.

The Court: Yes.

Mr. Bourquin: And I desire to offer to prove the prices, first, I will say, the value in the market of the wines specified in the complaint for each and every month commencing with May, 1943, and running down to date, likewise to prove the prices at which the wines were sold in the open market over each of the months mentioned, and running down including to date. That is what we desire to offer to prove, and to prove in addition to that, may I say, the differential, if any, between the contract price and those prices, of course, maintaining that there was and we offer to prove the differential.

Mr. Naus: So the record may be perfectly clear,

I assume that when you use the word "sale" in the offer of proof that you have just made you do not mean a sale by the plaintiff, Park, Benziger & Co.; you mean a sale by the Bercuts?

Mr. Bourquin: Well, a sale of these particular wines, as far as I am aware—I think we can say if it is not Bercuts, at least it is not Park-Benziger——

Mr. Naus: Well, I just want to clear this up.

Mr. Bourquin: I do mean the Bercuts, yes.

Mr. Naus: When you speak of a sale you do not mean a resale that might evidence a basis for calculating price by Park-Benziger to somebody else—

Mr. Bourquin: Yes. This would furnish a basis to that.

Mr. Naus: Well, I object upon the grounds heretofore stated. I think the record is clear.

The Court: Objection sustained.

Mr. Bourquin: Exception, your Honor please.

[247]

The Court: Yes.

Mr. Bourquin: One question further, your Honor, in accordance with your Honor's ruling.

Q. You told us, Mr. Bercut, that the value of the wines specified in the complaint in the month of May, 1943, the value in the market was \$6 for the dry wines, \$6.25 for the sweet; is that true?

Mr. Naus: Objected to as repetitious, and objected to upon the further ground that it is now the intent to inquire further about value at a date sub-

sequent to the date elected by the plaintiff as a breach, to wit, April 27th.

The Court: Are you adding something to it? Did you add to it the month of May?

Mr. Naus: Yes.

Mr. Bourquin: Perhaps, your Honor, that is correct. I formerly did ask him for the month of May.

The Court: Objection sustained.

Mr. Bourquin: All right, your Honor; exception. Because I misunderstood that when I asked the question I will ask this, Mr. Bercut:

Q. Will you tell us what was the value in the market of the wines specified in the complaint, to wit, the month of April up to and including April 27th?

The Court: Hasn't he already done that?

Mr. Bourquin: He said May, your Honor, before. I said May.

The Court: Well, I thought you asked him at the time the contract was made.

Mr. Naus: No. At this time, if the Court please, in view of the apparent misunderstanding in the record, I now move the court to strike out the previous answer given a while ago by the witness [248] with respect to that value in the market in the month of May, 1943, and to which he answered six dollars, upon the ground that the objection that has been made should have been sustained, and upon the further ground it relates to a date other than the day of breach.

The Court: Well, I suppose for the purpose of clearing the record so there will be no misunder-standing, that that motion ought to be granted. It is granted and you may proceed with your examination.

Mr. Bourquin: And we may have an exception to that ruling?

The Court: Yes.

Mr. Bourquin: Thank you.

Q. Mr. Bercut, the last question—I will repeat it——

The Court: No. You may just continue. Reframe your question.

Mr. Bourquin: Yes, your Honor.

The Court: As if you had not asked any question about the value of the wine.

Mr. Bourquin: All right.

Q. Mr. Bercut, do you know what was the value in the market of the wine specified in the agreement here, Plaintiff's Exhibit 2, that I have exhibited to you, during the month of April, 1943, up to and including the 27th day of that month?

Mr. Naus: Objected to, first, as immaterial; second, as outside the issues; and third, as an attempt to go outside the basis of the claim here, to-wit, to base the loss of profit which must be proved by a wholly different method.

The Court: Overruled.

A. The only way you can find out the value—
The Court: Q. No. Answer the question as

directly as you can. [249] If you wish to explain it, you may. What was the value? You understand the question asked by Mr. Bourquin was as to the value of the wine.

A. The dry wine, it was a good price at \$5.25 a case that month.

Mr. Bourquin: Q. What about the sweet wines?

A. Sweet wines, twenty-five to fifty cents higher in the market in the month of April.

Mr. Bourquin: If your Honor please, will you bear with me just one moment? I would desire, at the instance of my associate, to complete the offer of proof and have marked as an exhibit for identification and to be considered as a part of the offer of proof the document that I have given Mr. Naus.

Mr. Naus: I would make no objection, because I could not possibly make any objection, your Honor, to something being marked for identification. If counsel is now seeking to enlarge his offer of proof, I take it for granted your Honor would permit him to do it. He handed me a photostat of a statement that was referred to on the trial, and your Honor will recall the defense prepared and gave to them, and I have no objection to stating, only for the purpose of informing your Honor what we are talking about, that this purports to show all sales by the defendants to persons other than the plaintiff, or Mr. Serge Hermann, or Mrs. Hermann, of the wine in suit, and any other wine which they sold since, down to the present date.

You are merely asking to mark that for identification, to be considered in your offer of proof?

Mr. Bourquin: Yes.

May I ask Mr. Naus a question off the record, your Honor?

The Court: Yes.

Mr. Bourquin: If it meets with your Honor's consent, I will [250] ask to mark for identification this ledger sheet or schedule that Mr. Naus has referred to, and I would just desire to incorporate it in the offer of proof with the statement additionally, or rather, the stipulation, if it may be such—that is, if Mr. Naus would be kind enough to give it to me—that in the several columns dealing with the type of wines specified in the contract this schedule shows the sale of those wines in the amounts shown by this schedule, the same wines.

Mr. Naus: I concede that in a limited sense; I will not make a concession of fact in the case generally, but for the purpose of enabling you to shorten and simplify your offer of proof, and to identify the wines mentioned in the exhibit for identification.

The Court: It may be marked for identification.

(The documents referred to were marked Plaintiff's Exhibit 13A for identification.)

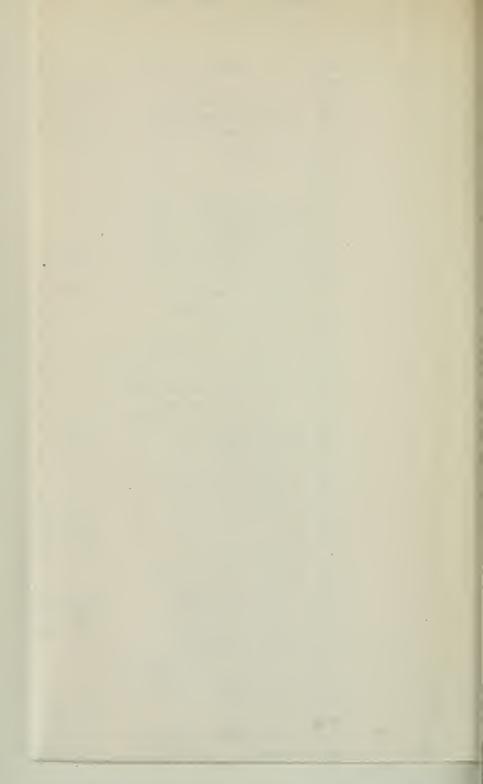
PLAINTIFF'S EXHIBIT 13A

P. & J. CELLARS—ANALYSIS OF WINE SALES

			No. of	Bur-			Sea-			Cresto D'Dro Chianti		F. 7. Cham-	Golden State Cham-	Dry Ver-	Sweet Ver-	Carbon- ated	Price Per	
1942:	Sold to	Explanatory	2	gundy	Claret	Rhine	terne	Sherry	Port	Туре	Tipo	pagne	bagoe	za on th	menth	Wice	Case	Total
9/30 9/30	Alpha Distributing Co. Scandia Commercial Co.	Sample (red)	10							2 10							\$5.50 6.00	11.00 60.00
10/23	Scandia Commercial Co.	Sample (White)	6							6							6.00	36.00
11/20			25							25							6.00	150.00
12/23	Jean Bercut		43								43						6.00	258.00
1943: 3/4	Park Benziger Co.		1076							1076							6.50	6,994.00
3/27	Park Benziger Co.		882							882							6.00	5,292.00
6/12	Park Benziger Co.		1064							1064							6.50	6,916.00
6/11	Polak Winters		600	===	#50	0.00		50						300	300		7.75	4,650.00
6/19 6/26	The Livesay Trading Co. City of Paris	Undelivered 2/29/44	2100 233	750	750	250	250	50	50	233							6.50 6.00	13,650.00 1,398.00
7/17	Monarco's Restaurant	Billed 12 cs. @ \$12. pr cs	24	12			12			200							6.00	144.00
7/21	Cohen's Smoke Shop	" 7 " @ \$12. " "	14	2	2	4	2	2	2								6.00	84.00
7/21	J. L. Feldheym	" 10 " @ \$12. " " " 5 " @ \$12. " "	20	4	4	4	4	2	2								6.00	120.00
7/22 7/22	Fred Solari's Restaurant Benedetti	' 5 ' @ \$12. '' '' '' 24 '' @ \$12. '' ''	10 48	2 16	2 4	2 4	2 16	4	2 4								6.00 6.00	60.00 288.00
7/22	Lauhscher Bros.	" 6 " @ \$12. " "	12	2	2	2	2	2	2								6.00	72.00
7/22	Martel's Wine Liquor Store	" 18 " @ \$12. " "	36	6	6	6	6	6	6								6.00	216.00
7/23	Golden Rule Restaurant	" 5 " @ \$12. " "	10		2	2	2	2	2								6.00	60.00 144.00
7/23 7/23	D. Mugnaini-Spreckels Mkt.	" 12 " @ \$12. " " " 5 " @ \$12. " "	24 10	4 2	4 2	4 2	4 2	4 2	4								6.00	60.00
7/23	Barney's Restaurant Harry Rathjen	" 7 " @ \$12. " "	14	4	2	2	2	2	2								6.00	84.00
7/24	Vintage Wines, Inc.	1st car Alabama	1500	200	500	150	250	200	200								7.00	10,395.00°
8/6	Scandia Commercial Co.		6									3	1		2		See (a)	100.50
8/13 8/20	Vintage Wines, Inc.	1st car Idaho	1500	400 400	410 390	400 400	185 215	55	50 50								7.00 7.00	10,500.00 10,500.00
8/20	Vintage Wines, Inc. Sherwood Liquor Co.	2nd car Idaho F.O.B. Oakland	1500 415	125	125	125	215	45 20	20								6.50	2,697.50
8/27	Vintage Wines, Inc.	2nd Alahama car	1500	200	500	150	250	200	200								7.00	10,395.00°
9/1	Harry Rathjen		440	100	100	100	100	20	20								6.50	2,860.00
9/3	Maison Paul Restaurant		12	000	***	450	200		F0							12	12.00 7.00	148.324 10,500.00
9/15 9/17	Viutage Wines, Inc. Vintage Winea, Inc.	3rd Idaho car 4th Idaho car	1500 1500	600 600	150 150	450 450	200 200	50 50	50 50								7.00	10,500.00
	Vintage Wines, Inc.	5th Idaho car	1500	600	150	450	200	50	50								7.50	11,250.00
10/14	Monaco's Restaurant		35									25	10				See (b)	756.65
10/18			11									10				1	See (c) 25.19	212.39 1,259.50
10/18 10/27			50 237									5	50			232	See (d)	2.641.28
10/29		3rd Alahama car	1200	200	500	150	250	50	50			"					7.50	8,910.00*
	Vintage Wines, Inc.	4th Alahama car	1525	300	600	250	350		25								7.50	11,323.12*
11/12		1st car Mehigan	1500	670	140	490	200		0.5								8.50 8.50	12,750.00 11,764.00
11/18	Clackamas Grocery Co. Universal Wine Liquor Co.	1st ear Oregon 2nd Michigan car	1384 1435	259 605	200 140	450 490	450 200		25								8.50	12,197.50
	Jimmie's Liquor Store	and Mengan Car	10		***								10				25.20	252.00
	W. P. King		10										10				25.20	252.00 125.95
	Cal. Liquor Store Vintage Wines, Inc.	5th Alabama car	5 1438	300	563	250	300	5	20				5				25.19 7.50	10,677.15°
	City of Paris—Wine Dept.	5th Alnoama car	200	-500	900	200	300		20	200							7.50	1,500.00
	Bal Tabarin		140							140							7.25	1,015.00
	Clackamas Grocery Co.	2nd Oregon car	1475	600	150	425	300							-	_		8,50	12,537.50 112.50
12 10	Scandia Commercial Co. Barney's Restaurant		11 20	1										5	5 20		See (e) 10.00	200.00
	St. Christopher Wine Co.		28									28			20		20.19	577.92
12 (18	Jimmie's Liquor Store		10										10				25.20	252.00 126.00
12 22			5										5		_		25.20 8.31	41.58
12 3 1944			5												5		0.01	11.00
	5 Jimmie's Liquor Store		1										1				25.19	25.19
1.2			5										5				25.19	125.95 315.70
	O Scandia Commercial Co. O Jimmie's Liquor Store		31	10									1	10	10		See (f) 25.19	315.70 75.5 7
2 2		Oakland	3 185	50	50	40	10						3 25	5	5	5	20.10 See (g)	1,867.25
	6 Buxton-Smith Co.	Arizona	1250	350	600	150	150						20	Ů	Ŭ		8.50	10,625.00
								001										223,111.42
	*Denotes 1% Discount	(a) G.S. \$25.00. F	29845	7374	6198	5652	4114	821	886	3638	43	71	136	320	347	245		22/11/14
	Denotes 176 Discount	(a) G.S. \$25.00. F	1. \$19.00	, ver. \$9.	20 (D) F	1. \$20.19	, «i.». \$2	9.10 (C)	r.J. \$20.1	19, Carb.	W. \$10.4	9 (d) F.I	. \$20.64, (arb. W.	\$10.94			

Denotes 3% Sales tax added

⁽a) G.S. \$25.00. F.I. \$19.00, Ver. \$9.25 (b) F.I. \$20.19, G.S. \$25.19 (c) F.I. \$20.19, Carb. W. \$10.49 (d) F.I. \$20.64, Carb. W. \$10.94 (e) Ver. \$10.50, Burg. \$7.50 (f) Burg. \$8.50, Ver. \$10.25, G.S. \$25.19 (g) Old atock \$8.25, Champ. \$25.19 (g) 10 es. Vermouth, no price



Mr. Bourquin: May it be further understood that we are not asking you for a stipulation that might exceed my privilege, but that we, in connection with the offer, offer to prove that the wines in the several columns shown on the schedule are the same wines specified in the contract, Plaintiff's Exhibit 2?

Mr. Naus: I think that is the whole indication of our colloquy so far.

Mr. Bourquin: Thank you.

One other matter in that connection. I would desire to incorporate into the offer of proof the deposition of Mr. Jean Bercut which was taken, I think, the early part of the week.

Mr. Naus: Let's clear that up. The deposition of Jean Bercut that you speak of is one taken a few days ago, and is limited solely to the subject matter of sales of the wine in suit [251] since the former trial. I will not stipulate that that deposition may be received, but I am perfectly willing to stipulate that it may be pinned to the offer for identification and be part of the identifying matter included in the last part.

Mr. Bourquin: It may be included in the offer of proof.

Mr. Naus: Well, of course, the offer of proof is your own.

Mr. Bourquin: Well, I desire that it may be considered——

Mr. Naus: I will put it this way—

The Court: I will consider it part of your offer.

Mr. Bourquin: I don't believe that deposition, due to the time element, has been returned by the——

Mr. Naus: Have you got a carbon? Pin it to the other.

Mr. Bourquin: Yes, we have.

Mr. Naus: Pin it to the schedule and let it be part of the identification. [252]

Mr. Bourquin: There are two depositions here, Pierre's and Jean's.

Mr. Naus: They appeared at the same time. Use the whole thing in the same way for identification.

Mr. Bourquin: If we may, your Honor, as part of the offer of proof.

The Court: It will be part of 13 for identification.

Mr. Naus: May the schedule be marked 13-A and the depositions 13-B, merely for identification? The Court: Very well.

(The depositions were marked "Plaintiff's Exhibit 13-B for Identification.")

PLAINTIFF'S EXHIBIT 13-B

[Title of District Court and Cause.]

DEPOSITIONS OF PIERRE BERCUT AND JEAN BERCUT

Be it remembered, that on Friday, the 10th day of March, 1944, at 11 o'clock A.M., pursuant to

Order Granting Motion to Take Second Deposition of Defendants and Fixing Limitations, at Room 715 Chancery Building, 564 Market Street, San Francisco, California, personally appeared before me, Thomas A. Dougherty, a Notary Public in and for the City and County of San Francisco, State of California,

PIERRE BERCUT and JEAN BERCUT,

witnesses called on behalf of the plaintiff herein.

George Olshausen, Esquire, Alfred F. Breslauer, Esquire, and Mrs. Thelma S. Herzig appeared as attorneys for the plaintiff; and Louis H. Brownstone, Esquire, and George M. Naus, Esquire, appeared as attorneys for the defendants Pierre Bercut and Jean Bercut, individually and as copartners doing business as P. & J. Cellars, a copartnership.

The said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witnesses, need not remain further during the taking of these depositions.

It was further stipulated that the said depositions should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by

(Plaintiff's Exhibit 13-B—Continued)

him into longhand typewriting, to be read to, or by, the said witnesses, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witnesses shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witnesses should be instructed not to answer questions propounded by counsel, in the absence of the Notary Public, it shall be deemed that the Notary Public has so instructed the witnesses to answer, but that they still refuse to answer.

Mr. Olshausen: Stipulated that the notary may be excused; and if any witness refuses to answer any question, it shall be deemed that the notary has instructed the witness to answer.

Mr. Naus: All right.

Mr. Breslauer: The appearances for the plaintiff, Mr. Hart, are Thelma S. Herzig, George Olshausen and Alfred F. Breslauer.

Mr. Naus: For the defendants are Louis Brownstone and George M. Naus. That is, for the defendants Bercut. We still have quite a bit of fiction; but I am not appearing for them.

(Testimony of Jean Bercut.) (Plaintiff's Exhibit 13-B—Continued)

PIERRE BERCUT,

one of the defendants, called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination by Mr. Breslauer:

(Unreported discussion.)

Mr. Breslauer: Have you a copy of this analysis of the wine sales that you can hand to Mr. Peter Bercut so he can refer to it, and I will have mine here?

Mr. Brownstone: You have got two. Why don't you give him one.

Mr. Breslauer: Q. Mr. Bercut, I hand you a computation entitled P. & J. Cellars, analysis of wine sales, and ask you if you recognize that as the analysis of the sales of wine made by the P. & J. Cellars?

Mr. Naus: One moment. If you will limit your question to analysis of sales since the former trial, there will be no objection.

Mr. Breslauer: Q. Well, now, Mr. Peter Bercut, referring to sales after September 22, 1943.

(The witness starts to talk to Jean Bercut.)

Mr. Naus: Just a moment. Jean, Peter Bercut is now a witness, and you shouldn't talk with him while he is a witness. Just sit back, and he will answer the questions.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Jean Bercut: He asked me a question.

Mr. Naus: I know, but there should be no talk between the witness and anyone else bearing on a question unless the other side wishes it and I wish it.

A. I have no knowledge of this business here.

Mr. Breslauer: Q. You are a partner of the P. & J. Cellars? A. Yes.

Mr. Naus: One moment, please. Now, that refers to sales happening since the former trial. Let us not go into the partnership and the like.

Mr. Breslauer: Q. Since September 28th, 1943, have you been a partner of P. & J. Cellars?

A. Yes.

Q. Did you make any sales of wines for P. & J. Cellars after that date?

A. No, sir, not myself.

Q. Did any employees under your direction make any sales?

A. My associate, Jean Bercut, made sales.

Q. Did you offer the wine to anybody for sale?

A. No.

Q. Did any employee under your direction offer the wine for sale to anybody?

A. I have no employee salesmen, myself.

Q. Did you fix the price of wine——. Let it be understood that my questions all refer to the events subsequent to September 28th, 1943, so I won't have to repeat it.

Did you fix-

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: One moment. Does that refer to all sales of wine under the Herman contract?

Mr. Breslauer: No, I will refer to that specifically when I do.

- Q. Did you fix the price for the sale of wine referred to in the Herman contract?
 - A. We did.
 - Q. Now—
 - A. You mean to Herman himself?
 - Q. No, after September 28th, 1943?
 - A. After September 28th, 1943.
- Q. After the last trial that we had in this case, did you fix the price of wine? A. No.
- Q. Do you know anything about the sale of wines to the Vintage Wines on October 29th?
 - A. No.
 - Q. Referred to as the 3rd Alabama car?
 - A. No.
 - Q. Did you have anything to do with that sale?
 - A. No.

Mr. Naus: One moment. Do you mean did he have anything to do after the last trial took place? It may or may not have been a sale that was made before the last trial.

Mr. Breslauer: Q. Did you have anything to do with the sale after the last trial? A. No.

Q. Referring to the sale on November 12th, Universal Wine Liquor Company, 1st Michigan car, did you have anything to do with that sale?

(Plaintiff's Exhibit 13-B—Continued)

A. No.

Q. Refer to the analysis which I have handed to you there, and look at all of the sales subsequent to September 22nd, and tell me if you had anything to do with any of those sales?

Mr. Naus: You mean anything to do after the former trial with them?

Mr. Breslauer: After the former trial.

A. No.

Mr. Breslauer: Shall we mark that analysis of wine sales as Exhibit "A" for identification for the purpose of an exhibit?

Mr. Naus: No reason why we shouldn't.

Mr. Breslauer: All right. Mark it for the purpose of this deposition.

(P. & J. Cellars analysis of wine sales was marked "Plaintiff's Exhibit A for identification," to be attached to the original.)

Mr. Breslauer: Q. Did you make this analysis up, Mr. Bercut? A. No.

Q. Who made this analysis up?

A. My office. I think it was prepared by-

Mr. Naus: My understanding is that it was prepared by Mr. Evans.

Mr. Breslauer: Mr. Evans.

Q. Did you have anything to do, Mr. Bercut, with the payment of commissions on these sales?

Mr. Naus: One moment. That assumes that commissions were paid on sales subsequent to the former

(Plaintiff's Exhibit 13-B—Continued)

trial; and as long as it contains that unproved assumption, I don't think the witness need regard the question.

Mr. Breslauer: Q. Were any commissions paid on any sales after September 28th, 1943?

Mr. Naus: You mean commissions paid after the former trial, or commissions on sales made after the former trial?

Mr. Breslauer: Commissions on sales made after the former trial. A. I don't know.

Q. Were any commissions paid on sales which had been accepted prior to the last trial but delivery made afterwards?

A. I would have to refer to the bookkeeping. I don't know that.

Q. Did you make any agreement with any broker or any individual for the payment of the commission on the sale of wines since the last trial?

A. Not myself.

Q. Do you know who did?

Mr. Naus: One moment. That assumes someone did.

Mr. Breslauer: Q. If anybody did, do you know who did?

A. That would be Jean Bercut. Nobody else could do it.

Q. Mr. Bercut, referring to Exhibit "A", will you look at the sales after September 22nd, and tell me if you know of any commissions paid on any sale listed on that exhibit?

(Plaintiff's Exhibit 13-B—Continued)

- A. I wouldn't know. I would have to refer to the bookkeeping. Absolutely, I can't give you any information that way, because I don't have it. It would be the most unreliable information you could get. You would have to refer to the bookkeeping.
- Q. Have you your books with you on sales since the last trial? A. No.
 - Q. Or commissions paid? A. Not me.
- Q. Well, has Mr. Jean Bercut the books with him?
 - A. He will testify for himself. I don't know.

Mr. Breslauer: Mr. Brownstone, have you got the books which would show whether or not commissions have been paid on the sales since the last trial?

Mr. Brownstone: No, we did not under the subpoena that was served. That is not required in the subpoena.

Mr. Naus: We have not moved our offices up here, Mr. Breslauer.

Mr. Breslauer: I didn't expect you would. Where is the subpoena?

Mr. Olshausen: As I understand it, we called your office and asked whether you would bring the same ones you had on the previous deposition subject to——

Mr. Brownstone: And I answered no to the question, subject to the limitation that the documents called for in the subpoena would be supplied with reference to sales after the last trial.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: In other words, the duces tecum has been regarded for practical purposes to be still in existence?

Mr. Olshausen: Yes.

Mr. Naus: That is, whether it is technically or not; but we read it under the limitation for the taking of the deposition.

Mr. Olshausen: That's right.

Mr. Naus: The only thing is that you gentlemen carry in your minds the thought that thus limited that you somehow may call for documents that may exist when you only imagine that they do exist.

Mr. Olshausen: In other words, your statement is that no such documents exist?

Mr. Naus: My statement is that the matter was fully covered in the letter Mr. Evans handed to the court at one of our sessions, which a copy was given to you, and which covered this matter fully; and my statement is based upon that, and also upon the statement that I made to the court.

Mr. Olshausen: Is your statement that there are no original documents in existence?

Mr. Naus: Mr. Olshausen, are you taking my deposition or the witness's deposition? Are you seeking to find what the limit and scope of your subpoena duces tecum is? We have told you two or three times this morning that so far as we know, no commissions were paid on sales subsequent to the former trial; but, however that may be, it must have

(Plaintiff's Exhibit 13-B—Continued)

been obvious to you at the first trial, and it surely ought to be obvious to you now that the present witness you have attends to none of these sales, and knows nothing about them. Why don't you turn to some other witness who has something to do with it and ask him about it?

Mr. Olshausen: You volunteered some statements about books——

Mr. Naus: All right. If we are going to get into an argument about it, I withdraw any statement I have made so far this morning, and leave you on your own from now on in.

Mr. Brownstone: And suppose you withdraw my remarks, too.

Mr. Naus: Yes, they are withdrawn, too.

Mr. Breslauer: Q. I asked you, Mr. Peter Bercut, to produce the records of sales of wine described in the contract, and being the sales since the last trial. Where are those records?

Mr. Naus: That question, Mr. Bercut, can be disregarded for the reason that counsel's question would call for sales of champagne, sparkling wine and of Chianti type as well; and I may say this to you, Mr. Breslauer, that we have with us what we understand to be all records in response to this duces tecum as to still wine, California wines, but not for the Chianti type sold since the former trial.

Mr. Breslauer: I read the subpoena, "the sales of wines described in the contract" is what my question included.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: I didn't so understand it. If you wish to limit your question to that, he may answer.

Mr. Breslauer: I read from the subpoena, and the phrase was in there "described in the contract." I am asking for the records of the sale of wine described in the contract since the last trial.

Mr. Brownstone: There is no limitation in the subpoena. You call for the records showing the amounts, the price, to whom sold and so forth, the quantity of wine sold by the defendants, together with the delivery slips showing the deliveries.

Mr. Naus: I believe we brought all those, so far as we know of.

Mr. Brownstone: I believe we have them here.

Mr. Breslauer: Could I see the record of sales made from the time of the last trial?

Mr. Naus: We will hand you the records, but we will not turn them over to be filed with the deposition, because we want to use them between now and the time of the trial; but you can look them over and satisfy yourself. I will ask you that you keep them in their order or sequence that you find them, because it is difficult to handle them once they are disarranged.

(Documents handed by Mr. Naus to counsel for plaintiff.)

Mr. Naus: Gentlemen, what is this, an inspection of papers or taking a copy of them here? Is that the purpose of this examination?

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Inspection for the purpose of examination.

Mr. Naus: I will suspend this deposition very shortly if you don't go forward with it and ask questions; I will do it within the next two minutes if you don't commence asking questions.

Mr. Breslauer: Q. I will ask you to look at that file of papers, Mr. Bercut; and ask you if you recognize those papers?

- A. The bill of lading. Shipment of wine. Bill of lading for a shipment of wine. I signed a lot of those.
- Q. Do you know anything about that transaction?
- A. No, I just signed the bill of lading. Some, I think—I think practically all the bills of lading are signed by me. I don't know. I was out in the office, and I signed them when they were presented to me for shipping.
- Q. Did you give the orders for the preparation of the bill?

 A. No.
- Q. You say that if there was any commission—if there was any deal made for a commission, that Mr. Jean Bercut would be the one that would make it?
- A. I don't say that. I say I didn't make it my-self?
 - Q. You didn't make it yourself? A. No. Mr. Breslauer: That is all of Mr. Peter Bercut.

(Testimony of Jean Bercut.) (Plaintiff's Exhibit 13-B—Continued)

JEAN BERCUT,

one of the defendants, called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination by Mr. Breslauer

Mr. Breslauer: Q. Referring to Exhibit "A", Mr. Bercut, the item under date of October 29th——

- A. May I see the copy there that is marked off? October is the tenth, is it?
 - Q. 10/29. A. 10/29. Yes, I see.
 - Q. Do you know anything about that sale?
 - A. Yes.
 - Q. Did you make that sale? A. Yes.
 - Q. Who was the purchaser?
 - A. Henry Behr.
 - Q. Henry Behr. That is the Vintage Wines?
 - A. Vintage Wines, yes.
- Q. Was Henry Behr the purchaser for the Vintage Wines? A. Yes.

Mr. Naus: One moment. One moment, please. I again point out to you that the questions should be limited also to events occurring subsequent to the former trial.

Mr. Breslauer: Q. Referring to that date, October 29th, Vintage Wines, 3rd Alabama car, was that car shipped on that date? A. Yes.

- Q. Did you prepare this analysis, Exhibit "A"?
- A. No. Our bookkeeper did.

(Plaintiff's Exhibit 13-B—Continued)

- Q. Are you acquainted with the items on it?
- A. Yes.
- Q. When was the order accepted, if there was any order, for that item of 10/29?
- A. I wouldn't remember the date; but it is long previous to that.
 - Q. Shipment was made on that date?
- A. Yes. Is the date there? You may find it there. Have you the bill of lading?

Mr. Naus: They are getting them out of order.

Mrs. Herzig: They were out of order.

Mr. Naus: I had examined them personally before we came over here, and found that they were all arranged in chronological sequence with the earliest date on top. Since we have been here, they have been shuffled and different persons handling them, and they are disarranged.

A. That's right, October 29th, 1943.

Mr. Breslauer: Q. When was the order on that accepted?

Mr. Naus: One moment, please. Again I point out that if you will limit the question to after the former trial, that it will not be objected to.

Mr. Breslauer: Withdraw the question.

- Q. Look at those documents, Mr. Bercut, and tell me what occurred in connection with that sale since the last trial?
 - A. Well, the delivery was made; and the sale of

(Plaintiff's Exhibit 13-B—Continued)

it too—I don't know when, or the day delivery was made. Does it say anything there?

Q. You look at it and you tell me if there is anything in those records which you have before you which tell you if any order was received since the last trial?

Mr. Naus: Well, there again I would like to know what you mean: Whether this car was shipped under a sale made some months earlier or whether it was an order buying wine in the first instance.

Mr. Breslauer: I am proving that.

A. That was part of the sale. I don't remember——

Mr. Breslauer: Q. Part of the sale made when?

A. Well, I will have to look that up. I don't know that. The date I don't know. I don't know when that was sold.

Mr. Naus: He wouldn't know whether it was before or since the former trial.

A. I wouldn't know that. I wouldn't know that.

Mr. Breslauer: Q. Was there any commission paid on that sale? A. Yes.

Q. How much of a commission was paid on that sale?

A. Let me see that, and I will tell you. \$1.00. \$1.00 a case.

Q. \$1.00 a case? A. Yes.

Q. Was that shipment made directly to the State of Alabama Liquor Control? A. Yes.

(Plaintiff's Exhibit 13-B—Continued)

- Q. Did the State of Alabama liquor authority make payment to Bercut Brothers?
- A. I think Behr paid us. Let's see, how was it now. Yes, Behr paid us. He paid us.
 - Q. And how much did Behr pay you?
 - A. \$7.50.
 - Q. He paid you \$7.50?
 - A. Yes. He paid us \$7.50 net.
- Q. Referring now to the item of November 11th, Vintage Wines, 4th Alabama car, I will ask you if there was a commission paid on that sale?
- A. No, we received——. I see now the thing here. We received \$7.50 net. No commission was paid. \$7.50 net from both lines.
 - Q. \$7.50? A. Yes.
- Q. Was the dollar commission that you testified to before that was paid to Mr. Behr, was that on any other sales since the last trial?
- A. I will tell you as we go along. All depends upon the price; but we got \$7.50 net on both of those cars. That is what we got.
 - Q. On both of those cars? A. Yes.
 - Q. You got \$7.50 net?
 - A. That was paid by Behr.
 - Q. Paid by Mr. Behr? A. Yes.
- Q. You received no money from the Alabama Liquor Control?
- A. I will be sure; but I don't—I believe Behr paid. He paid it, yes.

(Plaintiff's Exhibit 13-B—Continued)

- Q. Let us refer to the item of November 12th, Universal Wine Company, 1st car Michigan.
 - A. Yes.
- Q. And I will ask you if there was any commission paid on that sale?
- A. It is also figured \$7.50 net. What does yours read, \$7.50 or \$8.50, according to your ruler there?
 - Q. According to my ruler, it is \$8.50.
- A. \$8.50. Yes. That is a commission of a dollar that was paid on that.
 - Q. What was that commission paid to?
 - A. Behr. Henry Behr.
 - Q. That was paid to Behr? A. Yes.
 - Q. P. & J. Cellars received how much cash?
 - A. Well, we got the figure, \$12,750.00.
- Q. The dollar that you paid to Behr, did that come out of the \$12,750.00? A. Yes.
- Q. Referring now to the item of November 13th, Clackamas Grocery Company, 1st car Michigan; and I will ask you if there was any commission on that sale? A. Yes.
 - Q. What was the commission paid to?
 - A. Can I ask——

Mr. Naus: No, no. You either know or you don't know; so answer it according to what you know.

- A. I know the name, but I just forget the name. Let's see now. His name is Morasky.
 - Q. How much of a commission was paid?
 - A. Twenty-five cents.

(Plaintiff's Exhibit 13-B—Continued)

- Q. And as shown on Exhibit "A", P. & J. Cellars received \$11,764.00? A. Yes.
 - Q. Is that correct? A. Correct, ves.
- Q. And the twenty-five cents commission was paid out of the—— A. Right.
 Q. (Continuing) ——proceeds? A. Yes.
- Q. In other words, the purchaser paid for that wine, the purchaser being the Clackamas Wholesale Grocery Company, \$11,764.00, is that correct?
 - A. Correct, yes.
- Q. And in connection with my questions of what you did on the previous transactions, you would testify that the purchaser of the—on the transaction of November 12th—— A. November 12th, yes.
 - Q. He paid \$12,750.00?
 - A. Yes, that's right.
 - Q. And on November 11th, \$11,323.12?
 - A. Yes.
 - Q. And on October 29th, \$8,910.00?
- A. What was it—the eight thousand and how much? Was it the sale of the 3rd Alabama?
 - Q. The 3rd Alabama car.
 - A. The 3rd Alabama car, yes, \$8,910.00.
- Now, referring to the transaction of November 15th, was there any commission paid on that sale? A. Yes.
 - Q. How much of a commission was paid?
- A. We received \$12,170.00—\$12,175.50, and we paid a dollar commission.

(Plaintiff's Exhibit 13-B—Continued)

- Q. To whom was that paid?
- A. Henry Behr.
- Q. Referring to the bill attached to that group of papers in connection with that sale, the purchaser paid \$12,782.81 in the payment of that bill, is that correct?
- A. Must be some mistake here. Is that the same car? November 15th?
- Q. The difference between the statement and the bill is that there is some freight added to the bill.
- A. Yes. We paid for the freight, is that it? We paid for the freight.
- Q. I am referring to your bill there. Your bills says "added prepaid freight," which makes the total I just gave you of \$12,782.81; and I am asking: Did the purchaser pay that amount in payment of this bill?
- A. Well, those two figures match on that. Where is the figure here? Let's see now. Where are those figures? November 15th. Well, one statement says \$12,782.00, including the freight, so the difference in here—it says \$12,197.00. I wouldn't know. I wouldn't know why the difference. Anybody know the difference here?
 - Q. You don't know why the difference?
 - A. No, no, no.
- Q. Do you know how much you collected from the purchaser in that case?

(Plaintiff's Exhibit 13-B—Continued)

- A. Well, I will have to refer to the books. Maybe this is it and maybe this is it. I don't know.
- Q. Have you the books with you that you can refer to as to that?
- A. No, sir, no, sir. I don't see why there is a——Mr. Breslauer: Have you the books, Mr. Brownstone, which show how much was paid?

Mr. Naus: Mr. Breslauer, I think that is utterly immaterial. The question is what price the sales were made. Now, whether they were successful in collecting cash or not—we haven't the books here, and don't propose to go after them.

Mr. Brownstone: I might add to that that the bill attached to these documents states that the price is \$8.50; the total received was \$12,197.50, which corresponds exactly with Exhibit "A"; and the difference is added prepaid freight, \$585.31.

Mr. Naus: My understanding of these documents just from looking at them is that there is a price—how much is it—\$8.50—there was a price of \$8.50 a case f.o.b. San Francisco. For some reason of business convenience or otherwise, the freight was prepaid.

Mr. Brownstone: That is it.

Mr. Naus: So apparently the shipper prepaid the freight, and the goods were sold f.o.b. San Francisco. That is all there is to it.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: And we are asking whether you have any books to show how much the purchaser paid on that transaction that I have just referred to.

Mr. Naus: I haven't the slightest doubt in the world that there are books showing what cash was received from this or any other purchaser.

Mr. Breslauer: I am asking whether you have them here in answer to the subpoena duces tecum.

Mr. Naus: They are not here. I don't understand that the subpoena duces tecum calls for cash receipts.

Mr. Olshausen: I believe the subpoena calls for the names of the purchasers and the amounts received from them.

Mr. Naus: I have a copy of the subpoena if you want to look at it.

Mr. Olshausen: Yes. The person to whom, price at which and the quantities of such wine sold.

Mr. Naus: Yes, the price at which. We told you that. We were not asked to bring up any bank books or deposit slips or cash books or anything of the sort; and I think it would be a waste of time if the subpoena called for us to bring them; but, anyway, it does not call for it.

Mr. Breslauer: Q. Referring to the transaction on November 19th, was any commission paid on that? A. No.

Q. With reference to the transaction of November 19th and all previous transactions, do you know,

(Plaintiff's Exhibit 13-B—Continued)

Mr. Bercut, whether the purchasers paid any commission to any third person?

Mr. Naus: You mean all previous transactions?
Mr. Breslauer: That he has testified to since the last trial.

A. If he did what?

Mr. Breslauer: Q. Do you know if the purchaser paid any commission?

- A. No, not to my knowledge.
- Q. Not to your knowledge. Referring now to the transaction of November 22nd——

Mr. Naus: There are two transactions on that day.

Mr. Breslauer: Q. The Clackamas Grocery Company, 2nd Oregon car. I ask you if there was any commission paid? A. Yes.

- Q. How much a commission, and to whom was it paid?
- A. To the name I previously mentioned. What is his name? Morasky. Morasky.
 - Q. And how much of a commission was paid?
 - A. Twenty-five cents.
 - Q. Twenty-five cents a case? A. A case.
 - Q. Is that correct? A. Yes.
- Q. Refer to the transaction of February 24th, 1944, Grape Empire Wine Company, Oakland, and referring particularly to the wines referred to in the contract in this case: Will you tell me how much the purchaser paid the P. & J. Cellars for those wines?

(Plaintiff's Exhibit 13-B—Continued)

- A. The Grape Empire Wine Company of Oakland?
 - Q. Yes, that is correct? A. 185 cases.
 - Q. That is correct.
 - A. They paid \$8.25 a case.
 - Q. Was there any commission paid on that?
 - A. No, no commission to anybody.
- Q. Referring to the transaction of February 26th, 1944, Buxton-Smith Company, Arizona——
 - A. Yes.
- Q. (Continuing) ——was there any commission paid on that transaction?
 - A. Twenty-five cents.
 - Q. And to whom was that commission paid?
 - A. Morasky.
 - Q. That is twenty-five cents per case?
 - A. Yes.
- Q. Referring back to the transaction of February 10th with Scandia Commercial Company——
 - A. February 10th.
- Q. (Continuing) ——and particularly to the wine covered in this contract. I will ask you if there was any commission paid on that sale to the Scandia Commercial Company?
 - A. The payment of a premium—
 - Q. Ten cases of burgandy.
- Mr. Naus: The footnote shows ten cases of burgandy at \$8.50 a case.
 - A. No, no commission paid.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Q. I don't seem to identify that one. Can you do that for me, Mr. Bercut?

A. Universal Wines. Is there any bill of lading there?

Q. I have gone over every one, Mr. Bercut, and I have identified them. This is one that I haven't.

Mr. Naus: I can't say from my own knowledge, Mr. Breslauer, what that is. I can only make a guess, and you are not at all bound by it; but in looking it over, my guess is that it simply is an office memorandum forming the basis of a credit memorandum in the 5th Alabama car deal. You will observe that 5th Alabama car deal is carried into the total column, the last one on the right of Plaintiff's Exhibit "A" for identification as \$10,677.15, which is the final amount for which the customer was to have been billed under that shipment. This paper in my hand indicates to me that before this shipment, the purchaser had put up a certified check No. 8515 for \$10,951.87, thereby, as the events turned out, overpaying for the car, and this is a credit memorandum showing a balance of \$274.72 cash that goes back to the buyer. Now, that is only a guess on my part. I have never seen it before. Your guess is as good as mine; but that has all the earmarks to me of a credit memorandum that for office convenience, and not having any printed forms, they used for the office file an invoice form.

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Q. Since the last trial, Mr. Bercut, you are still a partner of P. & J. Cellars?

A. Yes.

Q. And there are no other partners besides you and Mr. Peter Bercut? A. No.

Mr. Breslauer: That is all.

State of California, Northern District of California, City and County of San Francisco—ss.

I hereby certify that on the 10th day of March, 1944, at 11:00 o'clock A. M., before me, Thomas A. Dougherty, a Notary Public in and for the City and County of San Francisco, State of California, at Room 715 Chancery Building, 564 Market Street, San Francisco, California, personally appeared pursuant to Order Granting Motion to Take Second Deposition of Defendants and Fixing Limitations, Pierre Bercut and Jean Bercut, witnesses called on behalf of the plaintiff herein, and George Olshausen, Esquire, Alfred F. Breslauer, Esquire, and Mrs. Thelma S. Herzig appeared as attorneys for the plaintiff; and Louis H. Brownstone, Esquire, and George M. Naus, Esquire, appeared as attorneys for the defendants Pierre Bercut and Jean Bercut, individually and as copartners doing business as P. & J. Cellars, a copartnership; and the said Pierre Bercut and Jean Bercut being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the depositions hereto annexed.

(Plaintiff's Exhibit 13-B—Continued)

And I further certify that the said depositions were then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of the taking of said depositions, and when the testimony of said witnesses was fully transcribed, said depositions were submitted to and read by said witnesses and thereupon signed by them in my presence, and that the depositions are a true record of the testimony given by the said witnesses.

And I further certify that the said depositions have been retained by me for the purpose of securely sealing them in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that the exhibit hereto attached and marked "Plaintiff's Exhibit A for identification," is the exhibit referred to and used in connection with the depositions of said witnesses.

And I further certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

(Plaintiff's Exhibit 13-B—Continued)

> Notary Public in and for the City and County of San Francisco, State of California

Mr. Bourquin: And I take it, your Honor, as the offer has been reinforced, it is understood it has been objected to by Mr. Naus and your Honor has sustained the objection?

Mr. Naub: I would not say "reinforced"; I would say "expanded."

Mr. Bourquin: "Expanded," then. That may be understood, counsel?

Mr. Naus: Yes.

Mr. Bourquin: That is all, your Honor.

The Court: That is all.

Mr. Bourquin: We will ask to recall Mr. Elman, if your Honor please.

The Court: Yes.

PHILIP ELMAN,

recalled; previously sworn.

Direct Examination

Mr. Bourquin: Q. Mr. Elman, prior to the date of April 27, [253] 1943 had your concern, Park, Benziger, sold or made any commitments for the sale of any of these wines?

A. We did make a commitment.

Mr. Naus: One minute. That can be answered Yes or No, if the Court please.

The Court: Overruled. You may proceed.

Q. You did make a commitment?

A. We did make a commitment for the sale of that wine to one of our wholesalers.

Mr. Bourquin: Q. Without telling us what it was, when you say you made a commitment, what was the nature of your commitment?

- A. Took an order for it.
- Q. Took an order, accepted an order?
- A. Yes.
- Q. For how much and what type of wine?
- A. 1,200 cases of the P. & B. California wines, which we had purchased from the Bercuts.
 - Q. Dry or sweet? A. They were mixed.
- Q. Mixed. Have you a record of the relative types involved, dry and sweet?
- A. They were to be comprised of the dry wines that were stipulated in the contract and the sweet wines in the ratio——

Mr. Naus: If the Court please, he was only asked if he had a record. I would like to object to it as

apparently calling for secondary evidence of the writing. And I might add that I think it was on the 4th of this month, perhaps the better part of a couple of weeks ago, I gave a notice to produce on the other side to bring in any records they had, orders, contracts and the like. Now, the question is put and the way the answer is started, the witness may be talking about an order orally accepted or it may be an attempt to state from memory something which a writing speaks about better. [254]

The Court: Are you moving to strike out the evidence?

Mr. Naus: I will object to the question as being ambiguous in the sense that the question does not disclose whether it is calling for an oral quotation or the oral acceptance of an order, or whether it is calling for secondary evidence of a writing.

The Court: Read the question.

(Question read.)

The Court: Overruled.

A. No, we have no record of the relative types of dry and sweet.

Mr. Bourquin: Q. Can you tell us on that order how much of the order related to dry wines and how much related to sweet wines?

Mr. Naus: I object to that as calling for secondary evidence.

Mr. Bourquin: He says no.

Mr. Naus: Please. I object to that as calling for secondary evidence of a writing, and I ask at this

time that any record they have of the order be produced.

The Court: Q. You said you had no record of it?

A. No, sir.

The Court: He has no record of it. Overruled.

Mr. Naus: May I examine him for a moment or two on voir dire in connection with it, then?

The Court: No, no, not at this time.

Mr. Bourquin: Q. Mr. Elman, was there a demand for the types of wine specified in the contract Plaintiff's Exhibit 2 in New York or in the territory with which you were concerned, dealt and sold in the month of April 1943?

A. We had to lock the doors, it was that bad.

[255]

The Court: No, no. The answer may go out. Answer the question as directly as you can. Read the question, Mr. Reporter.

(Question read.)

A. Yes, there was a considerable demand for those wines.

Mr. Bourquin: Q. Wholesale or retail?

A. Both.

Q. Did your concern at that time operate on both a wholesale and a retail basis?

A. We did, sir.

Q. In what quantity did such demands exist in your retail operations?

A. An immense quantity.

- Q. How much would you have sold if you had gotten the wine? A. All of that.
- Q. Do you know the operating charges of your concern for the handling of a commodity of the type and source, the San Francisco source, such as is specified in the agreement Plaintiff's Exhibit 2 in April of 1943.

Mr. Naus: One moment. Objected to upon the ground that no proper foundation has been laid to put such a question to this witness. Specifically, it does not appear that this witness runs the business; it does not appear that this witness supervises the accounting records; it does not appear that this witness keeps the accounting records.

Mr. Bourquin: Maybe I can add something to that, your Honor.

The Court: If you wish.

Mr. Bourquin: Please.

- Q. Mr. Elman, you told us the other day that you as vice president were charged with the sales and promotion of the product of Park, Benziger & Company; is that correct?
 - A. That is correct, sir.
- Q. As such did you or not have to do with the costs and charges [256] that your company incurred in the sales and promotion of those products?
 - A. Yes, definitely.
- Q. Do you know what the costs and charges to your company were and ran in April 1943 for the marketing at retail of commodities of the type and quantity specified in Plaintiff's Exhibit 2 here?
 - A. Yes.

Mr. Naus: Objected to upon the grounds here-tofore stated and upon the further ground that through this very witness it has heretofore appeared in this case that the plaintiff, Park, Benziger & Company, were entering into something entirely new as to which they had no experience with respect to costs of handling and the like, and it is an attempt to lay a foundation of the speculative possibilities of what costs they might be put to in promoting, handling and labeling a new line of California wines they never had before and to compare that with other products as whisky, packaged goods, and the like.

Mr. Bourquin: Isn't that a matter of cross examination, your Honor?

Mr. Naus: I don't think so. I made my objection.

The Court: Q. How long did you say you have been with the Park, Benziger Company?

A. Since 1939, your Honor.

Q. I think you said that the business consisted of imported wines and whiskies? A. Yes.

Q. Did you have anything to do with labeling and marketing these imported wines?

A. Yes, your Honor. I was actively engaged in the sales and promotion of all the merchandise of Park, Benziger.

Q. And you had been since 1939?

A. 1939, yes.

The Court: The objection is overruled.

The Witness: The answer was "Yes." [257]

Mr. Bourquin: Q. Mr. Elman, what did the charges and costs for the marketing of the commodities such as specified in Plaintiff's Exhibit 2 run your concern in April of 1943?

The Court: Do what?

Mr. Bourquin: Run—when I say "run" their concern, I mean what did they amount to for the marketing of such a commodity.

The Court: Cost what? To market what?

Mr. Bourquin: To market a commodity such as that specified here in Plaintiff's Exhibit 2, your Honor.

The Court: Make it more specific.

Mr. Bourquin: I will.

Q. Let me ask you, What did the costs and charges of your company run in April 1943 for the handling and sale of wines of the types specified here in the contract?

Mr. Naus: One moment. Objected to upon all the grounds heretofore stated, and upon the further ground that from the evidence it appears that they had no previous experience in handling such wines.

The Court: They had previous experience in handling wines, imported wines. It is true that conditions were such that they felt the need of dealing in domestic wines, and they turned to California for the purpose of getting domestic wines.

The Witness: That is right, your Honor.

The Court: Q. That is correct, is it not?

A. Yes, your Honor.

Q. Having in mind the experience you have had with marketing and promotion of wines and applying that to these domestic wines, as I understand it, you are answering these questions now; is that not true? A. Yes. [258]

The Court: What was that last question of yours? Mr. Bourquin: Q. What would you say——

The Court: You would have to make that more specific: 20,000 cases or 60,000 cases or whatever you have in mind.

Mr. Bourquin: Thank you, your Honor.

Q. Mr. Elman, what would the costs and charges for the handling and promotion and sales of wines—

The Court: Such as that described in the contract Exhibit 2——

Mr. Bourquin: Q. (continuing) ——run you per case, per carload or per thousand cases in April 1943?

Mr. Naus: That is all subject to the same objection.

The Court: Overruled.

A. About six per cent of the price, the selling price, your Honor.

Mr. Bourquin: Q. Six per cent of the selling price?

The Court: Q. Whether it was 1,000 cases, 5,000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor.

Mr. Bourquin: Q. It would run constantly irre-

spective, as the Court has asked you, of the number of cases involved?

A. That is right.

- Q. Did you have a price established if you sold wines of this type for your acceptance in April—when I say "wines for your acceptance of this type"—in April 1943?

 A. We did.
 - Q. How was the price established?
- A. We established that price according to the OPA methods then in existence and published same in the State of New York.
- Q. Did that deal with different types of dry and sweet?
- A. Yes, it did, with the identical types mentioned in the [259] contract.

The Court: Q. The identical types of wines mentioned in the contract, is that right?

A. Yes.

Mr. Bourquin: Q. You say you had and did post and publish the prices for the identical types of wines? A. Yes.

Q. What were those prices?

A. As I recall it—

Mr. Naus: Objected to-

The Court: One moment.

Mr. Naus: The witness has testified he posted and published prices. I now object to the last question on all the previous grounds and on the additional ground they are now calling for secondary evidence of a writing.

The Court: How about the prices? Have you got a list?

The Witness: There was a list, your Honor.

Mr. Bourquin: Mr. Naus, I am going to call his attention and ask to put in matter from an exhibit used in the earlier trial marked Plaintiff's Exhibit 12. Do you have it in mind, or do you want to see it?

Mr. Naus: I do not know which one of the two or more exhibits this one is. This is only one of two. This is marked "Retail."

Mr. Bourquin: I am asking about retailers now. Mr. Naus: Then you are amending your last question.

Mr. Bourquin: Well, I have to that extent.

- Q. You understand we are talking about retail now, do you not? A. Yes.
- Q. And we have been on this latter examination, is that correct? A. Yes.
- Q. Can you identify this as the schedule that you posted for the prices published for those wines?
 - A. Yes, this is the price [260] list.
 - Q. It was published or posted when?
- A. It was posted in the month of March for sale in April.
 - Q. For the month of April 1943, is that correct?
- A. Yes, sir. They were posted in March for the month of April, sir.

Mr. Bourquin: We will offer it in evidence, if your Honor please, and ask that it be marked Plaintiff's exhibit next in evidence.

Mr. Naus: Objected to first as outside the issues; secondly, upon the ground that the evidence is in-

sufficient to show and establish business in California wines of this type; third, on the ground there is no foundation to show any basis for any attempted effect of a calculation of supposed loss of supposed profits on that. There is no proof whatever—in fact, the proof is to the contrary—and no proof whatever that at the time of the contract, January 29, 1943, the defendants were put on notice or warning that if thereafter there was a breach, that loss of profits would be a consequence because of the unavailability of other wines in the market.

The Court: Overruled. Does that mention California wines?

Mr. Bourquin: Yes, your Honor, it does. Do you care to see it?

The Court: No, I don't care to see it. Do you wish to call attention to that?

Mr. Bourquin: Yes, your Honor.

The Court: Very well.

(The document was marked "Plaintiff's Exhibit 14.")

PLAINTIFF'S EXHIBIT 14 SCHEDULE OF WINE PRICES TO RETAILERS

Effective for the Month of March 1943

The undersigned licensee files the following schedule of prices to retailers pursuant to Section 101-B of the Alcoholic Beverage Control Law.

PARK, BENZIGER & CO., INC. Signed by JACK BENZIGER

President

24 State St. New York, N. Y.

License Number LL-281

This schedule is subject to such rules as the State Liquor Authority has or may hereafter adopt.

Discount for Time of Payment: 1% 10 Days.

Prices include delivery in N. Y., Bronx and Kings Counties. In other Counties, prices are on an f.o.b. New York County basis.

Deliveries will not be made on orders of less than one case.

All mdse. offered is subject to prior sale, war condition restrictions, strikes, labor difficulties, delays in transit, inability to obtain or deliver mdse. and conditions beyond our control.

All March prices on our schedule are subject to the new Federal Taxes effective Nov. 1, 1942.

No cash or quantity discount is allowed on these new taxes.

We reserve the right to limit sale and deliveries in accordance with customers' previous experience and needs. Should we be unable for any reason to complete an order in full, any instalment or proportion thereof that we are able to deliver, if accepted by the buyer, shall be regarded as delivery of the order.

This Schedule of Wine Prices to Retailers for April

Month of March 1943 Consists of 1 Pages.

SCHEDULE OF WINE PRICES TO RETAILERS

(Testimony	of	Philip	Elman.)	
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9	Per Case		19.95	21.95	19.95	21.95	20.95	22.95	20.80	22.80		19.95	21.95	19.95	21.95	20.95	22.95	20.80	22.80		96.9	0	8.50	10.00
Price	Per Battle																							
	Alcoholic Content		13%	"	"	"	"	"	"	"		"	"	"	"	"	,,	"	"		19%		13%	"
	Age																							
	Size		26 oz	13 oz	26 oz	13 oz	26 oz	13 oz	26 oz	13 oz		26 oz	13 oz	26 oz	13 oz	26 oz	13 oz	26 oz	13 oz		5ths	:	2ths	10ths
	Type of Beverage and Brand Name	Sparkling Wines—Domestic	"Pere Manon" Amer. Champagne		"Grand Bouquet" Amer. Champagne		"Pere Manon" N. Y. State Champagne	•	"Sondria" N. Y. State Champagne		Sparkling Burgundy—Domestic	"Pere Manon" Amer. Spark. Burgundy		"Grand Bouquet" Amer. Spark. Burgundy		"Pere Manon" N. Y. State Spark. Burgundy		"Sondria" Spark, Burgundy	,	Wines, Still, Domestie—New York State "H.V.D. (Hudson Valley District) Dry Wines	only—Sauterne, Rhine, Claret, Burgundy	"Bolognesi" (New York State) Haut Sauterne,	Rhine, Chablis, Claret, Burgundy	

Alcoholic Per Content Bottle

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Jry	32 oz	18%	8.55	12))	
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	ZO 70	18%	9.50	77	•	
Sweet	1/2-gals	161%	8.30	9	"	
		5007		, (, ,	
J.J.	½-gals	18%	8.30	9	:	
Sweet	gals	161%%	9.25	4	"	
v. Drv	مام	180%	0.05	_	"	
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California F & B Brand, dry						
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Schedule of Wine Prices to Retailers effective month of March 1943	April of March	1943			Page No 1	
		0101			T ago Tion	

The Court: How is that designated?

Mr. Bourquin: It is designated "Schedule of Wine Prices [261] to Retailers." At the top it is stated "Effective for the Month of March 1943," but at the bottom, at the execution it says, "This schedule of wine prices to retailers for month of April 1943 consists of one page." And there follows one page of the schedule of prices.

- Q. Mr. Elman, was this filed under the authority of the New York Liquor Authority?
 - A. It was.
 - Q. Filed with that Authority? A. Yes.
- Q. And then posted to your retail trade, published to your retail trade? A. Yes.
- Q. Without going through the whole thing, it showing other commodities, it does show that you filed and posted prices upon California P. & B. Brand dry Sauterne, Rhine, Claret, and Burgundy, P. & B. referring to the P. & B. Cellars product—

The Court: P. & B. what?

Mr. Bourquin: P. & B. referring to the Cellars as we have known them here, P. & B. being the Bercut Brothers' product; is that correct?

The Court: Well, look at it.

The Witness: That P. & B. was Park—do you mean P. & B. Brand?

Mr. Bourquin: Q. P. & B. Brand.

- A. Park, Benziger.
- Q. Oh, Park, Benziger?
- A. Park, Benziger.

- Q. I beg your pardon. In other words, this "California P. & B." refers to the Park, Benziger brand?

 A. That is right.
- Q. Dry Sauterne, Rhine, Claret, Burgundy, in 4/5 of a quart.

Mr. Naus: Fifths of a gallon.

Mr. Bourquin: I am reading 4/5 of a quart. It is on here.

Mr. Naus: Pardon me. [262]

Mr. Bourquin: Cases of 12 packages at \$10.51 a case.

- Q. Is that correct? A. That is correct.
- Q. Below it, prices filed for California P. & B. brand Port and Sherry, also 4/5 quarts, showing the alcohol content at 20 per cent, at \$10.96 per case of 12 bottles; is that correct?
 - A. That is right.
- Q. Let me ask you one further question: In this transaction your company undertook to pay the freight—in other words, you undertook to take this f.o.b. San Francisco, didn't you?
 - A. Yes, sir.
- Q. Did the charges that you have given us, six per cent of the selling price, not include your transporation charges to New York?
- A. No, they did not include the transportation charges.
- Q. Do you know what the transportation charges on liquor carloads—what charges prevailed for the shipment of such from San Francisco to Park, Benziger in New York in April of 1943?

- A. Approximately 35 cents a case.
- Q. Approximately 35 cents a case.
- A. Freight and insurance.
- Q. What? A. Freight and insurance.
- Q. Were there any other charges accruing to you in the operation of your business in the handling of wines of this type at that time in New York, April 1943, other than I have mentioned, namely, the six per cent operating charge, and you mention the transportation and insurance?
 - A. None, sir.

The Court: Mr. Bourquin, Mr. Naus called your attention to the fact that there was another schedule, I think.

Mr. Bourquin: There is a wholesale list that was used at the other trial. There was a wholesale list, your Honor, but before I approach that I want to ask the witness a question.

- Q. As you know, the condition of the market in New York in [263] April 1943, could you have marketed the whole 27,000 cases, the first lot mentioned in this contract, at retail?
 - A. Definitely, sir.
- Q. On the basis that you have already outlined to us today of charges?

 A. Yes, sir.
- Q. For the consideration—if I don't put it in— The Court: Excuse me. I thought you were overlooking something.

Mr. Bourquin: I appreciate that, your Honor.
The Court: I know Mr. Naus called attention

to it.

Mr. Bourquin: I think perhaps if I were on the jury, I would like to know it anyway. I would like to offer it.

Mr. Naus: Reluctantly or not, why don't you put it in?—over my objection.

The Court: Are you objecting, Mr. Naus?

Mr. Naus: Simply the general objections heretofore made.

The Court: Overruled.

Mr. Naus: But in that I am simply bowing to the rulings thus far made.

The Court: It hasn't anything to do with this case.

Mr. Bourquin: Yes, it has, your Honor. It contains the wholesale prices posted, if I may put it in evidence—

The Court: Why don't you tell the jury what it is?

Mr. Bourquin: I will call attention to the prices filed and posted for wholesale by Park, Benziger Company of California P. & B. Brand, Dry Sauterne, Rhine, Claret, Burgundy wine, 4/5 quarts, alcohol 12 per cent, case of 12 bottles, at \$6.75 a case; and on sweet wines California P. & B. Brand, Port and Sherry, same package, 20 per cent alcohol content, case of 12 bottles, \$7.50 per case. [264]

The Court: Are you offering that?

Mr. Bourquin: Yes, we do, your Honor.

(The document was marked "Plaintiff's Exhibit 15.")

PLAINTIFF'S EXHIBIT 15

SCHEDULE OF PRICES TO WHOLESALERS

Effective for the Month of May 1943

The undersigned licensee files the following schedule of prices to wholesalers pursuant to Section 101-B of the Alcoholic Beverage Control Law.

PARK, BENZIGER & CO., INC. Signed by JACK BENZIGER President

> 24 State St. New York, N. Y.

License Number LL-281

This schedule is subject to such rules as the State Liquor Authority has or may hereafter adopt.

DISCOUNT FOR TIME OF PAYMENT

— price is f.o.b. Chicago, Ill.

! " " foreign port, British Isles.

* " " Customs Bond, New York City.

" " Whse., New York City.

& " " San Juan, Puerto Rico.

% " " Winery, New York City.

" " " New York City.

(" " San Francisco, Calif.

/ " " Dinuba, Calif.

All quotations with the exception of the following symbols:

! f.o.b. foreign port, British Isles.

* " Customs Bond, New York City

include all Federal Taxes with the exception of the new Federal taxes effective Nov. 1, 1942. Same will be added to the price listed.

All quotations are subject to N. Y. State Tax.

Wholesalers 99 Hudson St., New York, N. Y. Asche Bandor Corp. 585-6th Ave., New York, N. Y. Baxter Importers, Ltd. 345 Hudson St., New York, N. Y. Capitol Dists. Corp. 68 W. Post Rd., White Plains, N. Y. Capitol Dists. Corp. Eber. Bros. W. & L. Corp. 52 Public Market, Rochester, N. Y. Eber. Bros. W. & L. Corp. 251 Bway, Buffalo, N. Y. Elmira Tobacco Co., Inc. 325 Carroll St., Elmira, N. Y. 382 Bway, Albany, N. Y. Graves & Rodgers, Inc. Monarch Liq. Corp. 1213 E. Erie Blvd., Syracuse, N. Y. 175 No. Water St., Rochester, N. Y. Rochester Liq. Corp. 372 Bway, Albany, N. Y. Rodgers Liq. Co., Inc. 535-5th Ave., New York, N. Y. St. James Wines, Inc.

Distribution of "Ron Libra" Puerto Rican Rum is restricted to:

Asche Bandor Corp. 99 Hudson St., New York, N. Y.

The following firm is restricted to the purchase of "H.V.D." (Hudson Valley District) and "Bolognesi" (New York State) Wines.

High-Life Products, Inc. 145 West 18th St., New York, N. Y.

Items, Prices and Quantity Discounts Contained in the April, 1943, Schedule Remain in Effect for This Month Except for the Changes Indicated on the Attached Schedule.

This Schedule of Prices to Wholesalers for Month of May 1943 Consists of 1 Pages.

			31 8					Pierre Bercut and Jean Bercut																		
			((Testimony					of Philip Elman.)																	
i	Discount For	Quantity		net	net	"	"	23	"	3	,,	,,	"	7	7.7	>>	7.7			"	"					
No. of	Per Per	Case		48	12	24	24	24	12	24	12	24	12	24	12	24	12			12	12					
Price	Per	Case		36.25*	17.85&	18.30&	22.50&	12.50	15.76"	17.36"	15.76"	17.36"	5.43"	6.63	6.66	7.86	6.45%			6.75(7.50(
<u>p</u>	Per	Bottle																								
Proof	Alcoholic	Content		84	85	"	;	"	13%	,,,	"	"	13%	,,,	"	"	161/2%			12%	20%		161/2%	18%	161/2%	18%
Age	or % Neutral	Spirits		$20 \mathrm{yrs}$																						
•	į	Size		$\frac{1}{2}$ pts	5ths	10ths	pts	$\frac{1}{2}$ pts	26 oz	13 oz	26 oz	13 oz	5ths	10ths	5ths	10ths	32 oz			4/5 qt	4/5 qt		1/2 gals	1/2 gals	gals	2 6.0
	Fage on Master	Schedule		Pg 1	1	Pg 1)			Pg 2)	Pg 2)	Pg 3		Pg 3	Pg 2									
		Type of Beverage and Brand Name Price Changes	Page on Master Schedule	"Marquis de Caussade" A.D.C. Imported Brandy	"Caray",-"Ron Suray",-"Ron Miron",-"Ron	Libra". Puerto Rican Rums			"Sondria" Champagne—Domestic	New York State	"Sondria" Spark, Burgundy	New York State.	"H.V.D." (Hudson Valley Dist.) Dry Wines only	-Sauterne, Rhine, Claret, Burgundy.	"Bolognesi" (New York State) Haut Sauterne,	Rhine, Chablis, Burgundy, Claret	"Vernat" Sweet Domestic Vermouth	New Items	California "P & B" brandy, dry, Sauterne, Rhine,	Claret, Burgundy Wine	California "P & B" brand, Port & Sherry	Discontinued Items	"Vernat" Sweet	" Dry	". Sweet	,, D _{PV}

SCHEDULE OF PRICES TO WHOLESALERS

24 State St., New York, N. Y.

Page No 1

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PARK, BENZIGER & CO., INC.

Dry

Mr. Bourquin: Q. Mr. Elman, can you outline for use the cost that would accrue and did accrue to your company in April 1943 for the handling and marketing of such wines at wholesale?

Mr. Naus: I presume I need not repeat my objection, although I renew it at this time. It is clear enough.

The Court: Overruled.

The Witness: You want the outline of the costs of that, as I understand?

Mr. Bourquin: Q. Please.

A. This merchandise is posted at these prices f.o.b. San Francisco. Therefore, there wouldn't be any question of freight entering into those particular prices. They were sold f.o.b. here.

Q. And insurance?

A. Freight and insurance. There would be no handling on our end of it there, other than a rebilling process for wholesale sale, since it was sold to the buyer here in San Francisco. The only work that we would possibly do would be the rebilling of the merchandise to the people we sold it to. We figured the overhead on that at two per cent, sir.

- Q. At two per cent?
- A. Of the sale price.
- Q. So in the wholesale you are charged with two per cent, and in the retail six per cent plus 35 cents a case—
 - A. Transportation and insurance.
 - Q. Transportation and insurance?

A. That is right, sir.

Mr. Bourquin: One further question.

- Q. To your knowledge did Park, Benziger have a demand in New York in April 1943, at retail or wholesale or both, for the whole [265] 60,000 cases of the types of wines specified in the contract?
 - A. Oh, yes.
 - Q. Which way?
 - A. Both ways, retail and wholesale.
 - Q. Would either have consumed it?
 - A. Definitely.

Mr. Bourquin: You may cross examine.

Cross Examination

Mr. Naus: Q. I understood you to answer Mr. Bourquin that you stated to him all your expenses for selling this wine; is that correct—six per cent of your gross sales on retail and two per cent of your gross sales on wholesale, freight and insurance, and this and that? Would you speak out so the reporter can hear you? A. Yes.

- Q. Have you included any expense for a salesman? A. No, we have not.
 - Q. Why not?
- A. General overhead of the business included it at six per cent. We take those figures to sell the merchandise.
- Q. You mean to suggest, do you, that if you paid Hermann fifty per cent, that that would be embraced in your two per cent in one case or your six per cent in the other?

A. That is right.

Q. Do you mean to say that after paying Hermann fifty per cent of the net profits, your cost of doing business in one instance would be only two per cent of your gross sales?

Mr. Bourquin: We object to that, your Honor, as not proper cross examination, as I understand it.

Mr. Naus: If it isn't what is it?

Mr. Bourquin: The test here would be what was the net result to these people irrespective of what, you might say, appended as a charge under Mr. Elman's direction.

Mr. Naus: If the Court please, anyone who looks at the [266] complaint in this case will find that the only plaintiff in this case is Park, Benziger & Company. You won't find the names Hermann, Serge Hermann, Mrs. Serge Hermann, Mrs. Louise Hermann, or Chauteau Montelena of New York anywhere in the caption of the pleading. Here is the sole plaintiff.

Mr. Bourquin: He is entitled to prove—— Pardon me, your Honor.

The Court: What were you going to say?

Mr. Bourquin: I was going to say we were attempting to reduce this to a net profit. Their arrangement with Mr. Hermann was merely for a participation in the net profit.

The Court: Yes.

Mr. Bourquin: So I say that is a matter between the plaintiff and Mr. Hermann, with which the de-

fendant has nothing to do, and it is irrelevant and immaterial.

The Court: It seems so to me.

Mr. Naus: That would depend, it seems to me, on what instructions your Honor finally gives to the jury, if we get to that point.

The Court: It may be so.

Mr. Naus: It might turn, if you instruct the way the defense has requested you, on whether the jury finds Mr. Hermann to be a partner or a joint venturer, on the one hand, or a mere employee on the other. It might be it will be for the jury to consider, if he was a partner or a joint venturer, the plaintiff was bound by his act in signing the cancellation of April 27, or, on the other hand, if they find he is merely an employee or a salesman on commission, then whatever they had to pay him was part of their expense of doing business, their selling expense. That is my theory. [267]

The Court: I understand what your theory is. I overlooked that point as to the joint venture. It might be I will instruct the jury as to that. I do not know at this time.

Mr. Naus: I will reframe the question and put another one.

Q. Now, Mr. Elman, this retail list, Exhibit No. 14, the wines that are involved here are in there under what heading?

A. P. & B. Brand, Mr. Naus, California P. & B. Brand. Right here, sir (indicating).

- Q. California P. & B. Brand, dry, Sauterne, Claret, Rhine and Burgundy; and then next Port and Sherry?

 A. That is right.
 - Q. Those items? A. Yes.
- Q. You say that list was published for the month of March 1943, as I understand it? A. No.
 - Q. I see it is typed "March" in there.
- A. Yes, these were so set up, which should have been effective for the month of—and then down here—you see, the New York State law states that we have to publish these prices by the 10th of the preceding month. If we wanted to sell this wine in New York State in April, we would have to send in the price list by the preceding month, March 10, after which we could not submit a new price list to the State. Therefore, we listed the P. & B. Brand in the month of March with New York State before March 10 for sale in the month of April.
- Q. That paper that you have in your hand, Plaintiff's Exhibit 14, just a word or two, when was that filed with the New York State Authority? I am asking now about a date.
- A. Before March 10, sir. It had to be in before March 10.
- Q. Was that effective for all time thereafter, or only for a particular month?
- A. They were changed from month to month as the licensee saw it. [268]
 - Q. In that particular list there you are posting

in February prices at which you will make sales in March and only in March, aren't you?

A. I beg your pardon?

Mr. Naus: May I have it read?

(Question read.)

A. That is rather ambiguous.

The Court: No.

A. Once we post a price it can continue on, if we continue to renew it. Monthly it is renewed. We can either delete it or continue it.

Mr. Naus: Q. What do you mean by renewing something in New York? Tell me what you do and how you mean.

- A. It has to be sent to the Liquor Authority every month, the price list. We either delete items which are discontinued or we add new items to the list.
- Q. You have to make up a new list on that kind of a form each month?
 - A. That is right, sir.
- Q. In February you made up this list to be effective in the month of March and filed——
- A. No, no. I am sorry. We made it up—we sent it in March, and it is effective for April.
- Q. I am looking at the top, the printing that is typed in there.
- A. No, this means it was sent in in March and effective in April, which has been crossed out. That is one of the lists that were in the office. I am sorry.

- Q. Perhaps I misunderstood you. I understood you to say that it was published in April. Regardless of what is written on there, on what date was it that you filed it with the New York State Authority?

 A. On the 10th of March.
 - Q. To be effective for the month of April?
 - A. April. [269]
- Q. Sometime in April you would have to file a new one to be effective in May, is that right?
- A. Before the 10th of April, that is right, for the 10th of each month.
 - Q. Did you ever file one?
 - A. For the renewal of the—
- Q. I will reframe it. Did you ever file one in April to be effective in the month of May?
 - A. Yes.
 - Q. A retail list?
 - A. It is available with the State Authority.
 - Q. Pardon me?
- A. I say the copy is filed with the State Authority.
 - Q. When did you file that?
 - A. By April 10.
- Q. Did you ever file one in May to be effective for the month of June?
 - A. No, we deleted it then.
 - Mr. Bourquin: Q. You mean on these items?
 - A. On those two items, that is right.
- Mr. Naus: Q. Then, as I understand it, on the retail list you filed one in March to be effective in April—— A. Yes.

- Q. —and then a month later you filed one in April to be effective in May? A. Yes.
 - Q. Are you sure of that now?
- A. Just let me think a moment, sir. Yes, that is right.
 - Q. When in April did you file it?
 - A. Before the 10th, sir.
 - Q. Did you personally attend to the filing?
- A. No, that is attended to by our girls in the office.
- Q. Was that attended to before you left New York for San Francisco?
 - A. I should imagine it was.
 - Q. Let us not imagine. Was it?
 - A. I think so, yes.
 - Q. Let us not think about it. Do you know?
 - A. It was filed, sir.
- Q. I see. Turning to Plaintiff's Exhibit 15, that is, a list for sales to wholesalers, is it not?
 - A. That is right. [270]
- Q. That Plaintiff's Exhibit 15 you have in your hand was turned in to the New York State Authority on what date?

 A. May, sir.
 - Q. Pardon me? A. In the month of May.
 - Q. What date in May?
- A. The 1st, I should say, or prior to the 1st it has to be in—
- Q. No, let us not have a long speech about it. I am only asking you about one date. On what date was Plaintiff's Exhibit 15 or the original of it filed with the New York State Authority?

- A. The law requires it to be in before the—
- Q. I am not asking you that, Mr. Elman, please. On what date was it filed?
 - A. That I don't know, sir.
- Q. A schedule of prices to wholesalers to be effective for the month of May would have had to be filed in April, wouldn't it?
 - A. That is right, sir.
- Q. Well, if you do not know the date, can you tell me the month? Did you file it in April or did you file it in May?
 - A. It must have been filed in April.
 - Q. When in April was it filed?
 - A. Before the 1st of April.
 - Q. Before the 1st of April?
- A. It must be in by the 1st. Therefore—I mean, they do not permit the new addition—I mean new list—the list has to be in to the State Authority by the 1st of the month for wholesale and by the 10th of the month for retail.
- Q. Do you mean by the 1st of the month in which it is to be effective?
 - A. No, it always the following month.
- Q. Are you telling me you filed it in April but on a date before the 1st of April? I don't know. I don't follow you. Perhaps I am dumb.
- A. You aren't dumb; you are just trying to confuse me. The law is definite. It says—— [271]
- Q. Take your time; think it over and tell me. You say you do not know when it was filed. Tell

me when it had to be filed instead of telling me the 1st of the month—give me the name of the month. We keep getting the months mixed up.

- A. What is your direct question on that? and I will try to answer it.
- Q. You have in your hand a paper that we call Plaintiff's Exhibit 15. It is what is called a whole-saler's list. It says at the top it is to be effective for the month of May 1943. I am trying to find out when that was filed, the date it was filed with the New York State Authority. That is all I am trying to find out.
 - A. It must have been filed in April, sir.
 - Q. And about when in April?
 - A. From the 1st to the 3rd.
- Q. 1st to the third. Within the first three days of April, do you mean? A. That is right.
- Q. Did you or did you not have anything to do with the filing of that wholesaler's list before you left New York for San Francisco?
- A. Yes, we established the price of wine and established the wholesale price on it.
- Q. Now, that wholesaler's list has on it, as you observe, a list of the names of ten wholesalers with their street and city addresses given.
 - A. That is right.
 - Q. Were they customers of yours?
 - A. They were.
- Q. In that list that you were publishing to be effective in the month of May were you offering

these Bercut wines to that list of ten specifically named wholesalers, your customers?

- A. No Bercut wines could be purchased by any wholesaler in the State of New York. This refers to certain types of merchandise which are on restricted lists. [272]
- Q. Well, the Bercut wines were put on a whole-sale list to be bought by any one of those ten customers of yours or by any other wholesaler in the market, weren't they?

 A. That is right.
 - Q. It is a public general offering to wholesalers?
 - A. That is right.
- Q. Prior to April 27, 1943 had Park, Benziger & Company ever sold any of this Bercut wine to any retailer?
- A. Yes, we have many retailers come into the office asking for wines, and we had showed them the samples which we had received from the Bercuts.
- Q. Mr. Elman, I didn't ask you who called at your office. I said had you in fact actually sold any? Had you committed yourself to anybody?
- A. Sure; we told them when they came in we expected to have these wines for sale and just as soon as they were available we would let them have them, and they asked us for them.
- Q. A businessman generally knows what a commitment is. Did anybody give you an order for any?
- A. We couldn't sell anything we did not have, in so far the delivery had not been made physically in New York.

- Q. That is argument.
- A. It is no argument. I didn't mean it to be that way.
- Q. As I understand it, you had not signed up an order committing you as a businessman upon any specific sale to any specific retailer, had you?
 - A. No.
 - Q. Pardon me?
- A. I am sorry. You said written order, and I said no.
- Q. Well, if you got it on the telephone you would write it down on a paper and treat it as an order?
 - A. I suppose so. [273]
 - Q. Did you do anything of the sort?
- A. There were quite a number of people in the office. We showed them the list. They liked them, and we said as soon as we were ready to set them up, bring them in—and they said they would be glad to have them.
- Q. Up to April 27, 1943 had you actually signed up any order to any wholesaler?
- A. No; I got an oral order from one of our customers which we took—accepted, I mean, verbally.
 - Q. Some wholesaler in New York?
- A. The Globe Distributing Company in Washington, D. C.
 - Q. A carload more or less?
 - A. About 1,200 cases.
 - Q. Nearly a carload? A. Yes.
- Q. It was at least a minimum carload, wasn't it? A. Yes.

- Q. Had you sold any in New York City?
- A. I made commitments to the people that came up to the office to this effect: that when the wines were available, physically available, in New York City that we would send them the wines that they wanted. They tested the wines without any labels on them, samples we had gotten from the Bercuts, and after testing the wines they liked them very much, and we said, "Just as soon as we are ready with them—we are working on the labels—just as soon as we have them physically available, we will let you know."
- Q. Now, those prices in the wholesale list named there are prices f.o.b. San Francisco, the way you bought them?

 A. Yes.
- Q. The prices in the retail list are prices f.o.b. New York? A. Yes.
- Q. You would have to pay the freight in addition to the price paid to the Bercuts, is that correct? Would you speak up so the reporter can hear you.
 - A. Yes. I am sorry.
- Q. This sale to the wholesaler at Washington, D. C., 12,00 cases—was that dry or sweet wine or both?
- A. It was [274] supposed to be a division between sweet and dry.
 - Q. In what proportions?
- A. In the proportion that we were going to receive it in the contract—about five to one. I guess, six to one.

- Q. In whatever percentage of sweet wines appear in the 26,691 cases in the Bercut contract, that distributor would get roughly the same percentage, wouldn't he?

 A. About the same.
- Q. The sweet wines were a very small percentage of this deal? A. They were.
- Q. For all practical purposes the dry wine was the deal, wasn't it?

 A. Yes, sir.
- Q. Was your arrangement with this wholesaler in Washington, D. C. on an f.o.b. San Francisco basis? A. Yes.
- Q. Did you make that arrangement with him before or after your posting or filing or publishing of Plaitniff's Exhibit 15, the wholesale list?
 - A. I don't recall, sir.
- Q. Do you mean you may have sold it to him before you published a price at all? Λ . Yes.
- Q. Was it to be a deal with him on the basis of such a price some time thereafter published or posted?

 A. That is right.
- Q. Now, you were out here about in the middle of April, and for a few days after that, to complete arrangements for labeling, packaging and shipping the wine; you remember that?
 - A. I testified to it.
- Q. Assuming that all the parties had gone ahead and you had furnished the labels and shipment had started at the time you contemplated when you arrived in San Francisco, when would the first car have left San Francisco?

- A. Within a few weeks after I arrived.
- Q. Well, within what time after April 27 would the first carload [275] have left San Francisco?
 - A. Within two weeks, maybe three.
 - Q. The middle or the latter part of May?
 - A. That is right—about the first half.
 - Q. Reaching East about the early part of June?
- A. About the end of the month, the end of May, the early part of June.
- Q. And then the next car would be about the end of June or the first of July, that is, at the rate of a car a month, wouldn't it? A. Yes.
 - Q. You now have it right? A. Yes.
- Q. And the third car would have reached the East about the 1st of August?
 - A. I suppose so.
 - Q. Correct? A. I suppose so.
- Q. Let us not suppose. You are the one who knows. I am asking to find out.
- A. It never happened, so how would I know when it arrived?
- Q. If it had happened I would look to the freight bill or the bill of lading and not have asked you.
- A. It would depend on how much time it took the cars to get from San Francisco to New York. I have no knowledge of what didn't happen, when it didn't happen, any more specifically anyhow.
- Q. Then it would have taken about three carloads to keep you to the 1st of August 1943, as I understand it? A. I think so.

- Q. Having in mind that you tell us that you were in charge of the sales, posting of prices—you are familiar with that, an expert in that—perhaps I would not be presuming too much to assume that you know that in August 1943 the OPA put a ceiling on you; you know that, don't you?
 - A. In August? [276]
 - Q. Yes. A. A ceiling on us?
 - Q. In August 1943, yes.
- A. There is a revision—there is a revision constantly on OPA ceilings. At that particular time I don't recall what the ceiling was. Do you have the OPA revision of that month?
- Q. I have something that looks like it. I will ask you whether or not in August 1943, beginning then and ever since——

Mr. Bourquin: Before you testify to that——
The Witness: If I have been qualified as an expert, maybe I will get a job.

Mr. Naus: No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943, beginning then and continuing ever since, you have been under an OPA ceiling of 25 per cent in your mark-up. A. Yes.

Q. So that had this contract been carried out,

under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater mark-up than 25 per cent; now, you know that, don't you?

- A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an OPA price on that merchandise. I doubt very [277] seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices.
- Q. Aside now from the New York State Authority price—— A. Yes.
- Q. —had you prior to August 1943 ever established with the OPA any price? A. Oh, yes.
 - Q. When and where and with whom?
- A. When the OPA came out, when New York State took on the new Hallowell bill, a law which stated we had to submit the price to them the month preceding the month in which we were going to sell it, and when the OPA came out with prices, the Hallowell stipulated the top sheets of every distributor were to read that all prices submitted in

New York State conformed with OPA price regulations, to which we attested, after we had gotten our price from OPA.

Q. Beginning with what date?

A. I don't recall the exact dates. It was prior to that when the OPA fixed the price of merchandise in the liquor business. We filed the New York State schedule with that in mind. New York State required that qualification in the prices submitted to that.

Mr. Naus: If the Court please, at this time, as long as Mr. Elman has been recalled, I would like to reopen for a question or two that I intended to ask him when he was on the stand before and that I overlooked.

The Court: Very well.

Mr. Naus: Q. Mr. Elman, Park, Benziger & Company is merely a subsidiary owned 100 per cent by another corporation, isn't it? A. It is.

Q. And what is the name of that other corporation?

A. Finlay, Holt & Company. [278]

Q. You were answering Mr. Bourquin something about the incorporation of Park, Benziger & Company. The fact of it is it has never had a capital of more than \$1,000, has it?

Mr. Bourquin: What do you mean by that?

Mr. Naus: Just what I say.

Mr. Bourquin: We object to the question as indefinite, your Honor.

The Court: Overruled.

A. No. And may I explain that answer, your Honor?

The Court: Yes.

A. Park, Benziger & Company has \$1,000—oh, what would you call it in legal terms?—capitalization, in other words. That is more or less to limit the liability of the officers of Finlay, Holt & Company, the personal liability of the officers of Finlay, Holt & Company. The company gets its money from Finlay, Holt & Company, adequate funds, sufficient sums to carry on a business extending over a million and a half dollars a year in 1942, and increasing since then up to the present time to approximately over three million dollars a year, which can be done on a thousand dollars. We pay a license in the State of New York as a wholesaler of \$4,000 a year, plus licenses we have in all States that we do business with and require it, which runs into several thousand dollars a year, plus the salaries of employees, and so forth, which runs for the overhead of the concern into quite a considerable amount of money. Of course, that all cannot be done on a thousand dollars. So the funds are drawn from Finlay, Holt & Company as they are required by Park, Benziger & Company. There are 20,000 shares actually issued against it, of which there is \$1,000 put into the capitalization stock. [279]

Q. In other words, when this plaintiff corporation was organized its issued capital stock was issued against \$1,000 in cash, and that is the only

(Testimony of Philip Elman.) capital as such that has ever been paid to Park, Benziger & Company; have I got it right?

- A. Well, you mean paid in to Park, Benziger & Company?
- Q. Yes, when the stock was issued by Park, Benziger & Company to Finlay, Holt & Company, which owned it, \$1,000 in cash was paid in as the capital against that stock?

 A. That is correct.
- Q. Then if, as and when Park, Benziger & Company made any profit since, it has immediately been paid out in dividends to Finlay, Holt & Company, hasn't it?
- A. Not immediately; at the expiration of the year.
- Q. Maybe I can put it in another way. Is it or is it not a fact that any businessman picking up at any time the current balance sheets of Park, Benziger & Company would find current assets and current liabilities just about equal or at a stand-off?
- A. That is the way it is done with all subsidiary corporations in most circumstances. U. S. Steel—their subsidiaries balance one another because the mother holding corporation is the one that shows the difference.
- Q. I haven't heard the word "Yes" or I haven't heard the word "No" in your answer.
 - A. I am sorry.
- Q. Do you mean to say Yes, anybody picking up the balance sheet of Park, Benziger & Company at

any time, any current balance sheet, would find current assets and current liabilities were not equal or at a standoff?

- A. No, our latest statement came through a little differently.
- Q. I will put it this way, then: Anybody up to and including April 27, 1943, picking up a current balance sheet, would find [280] current assets and current liabilities just about at a standoff?
 - A. Yes.
- Q. And I understood you to say that that structure was set up to protect somebody against incurring any liability in connection with the operations of Park, Benziger & Company; is that right?
- A. The officers of the mother holding corporation.
- Q. You mean the officers or the holding corporation itself?
- A. Well, I don't know corporate laws. We are going to get a little involved now.
- Q. Let us put it this way: They set up this Park, Benziger Company on that type of capital structure and handled it in the way we discussed——
 - A. Yes.
- Q. In order to protect whoever was interested in Park, Benziger & Company from facing any possible liability?

 A. Oh, no, definitely not.
- Q. What did you mean, then? It was done to limit the liability of somebody?
 - A. I mean my understanding, which might be

poor, is that in this particular instance it means that the individual limitation—of course, your Honor could help me on that, I guess—the individual limitation, the individual person who is an officer in Park, Benziger & Company and in Finlay, Holt & Company is limited in his personal loss, so far as that was concerned. But Finlay, Holt & Company was solely responsible for any liabilities of Park, Benziger & Company, because they own all our stock.

- Q. Did Finlay, Holt & Company ever sign a paper and send it to the Bercuts telling the Bercuts they would stand behind this Hermann contract?
 - A. It was not necessary. They didn't ask for it.
 - Q. Was it ever done? A. No. [281]

Mr. Naus: That is all.

Redirect Examination

Mr. Bourquin: Q. What was the nature of the Finlay, Holt Company?

- A. I beg your pardon?
- Q. What is the nature of the Finlay, Holt Company, the parent company?
- A. They are exporters and importers and a financing corporation—bankers.
 - Q. Are you familiar with their capital structure?
- A. They run about \$160,000, I believe, in their paid-in capital structure. [282]
- Q. Did these gentlemen, prior to this break-up, ever raise any question about the credit capacity or standing of this firm?

 A. No, sir.

- Q. Was that information always available to them through Dun & Bradstreet's?
 - A. Yes, sir.
 - Q. Still is? A. Yes, sir.
- Q. May I ask a question back again on this subject of your New York price, so we will understand? They were fixed with reference to ceilings and with reference to mark-up, is that it?
 - A. That is right, sir.
- Q. Will you tell me whether or not in the months of May, June, and July, let us say, your market or your demand that you described continued or abated?

Mr. Naus: That is not proper redirect, your Honor. Objected to as such.

Mr. Bourquin: A while ago he wanted to stand on the month of April. Now he has advanced his own theory into the month of August, and even beyond, and he wants to use his own interpretation of the OPA mark-up regulations to control the period beyond. I think if he does that we ought to be permitted to go into it.

The Court: No question was asked as to whether the market continued or abated.

Mr. Naus: I only asked about the price lists.

The Court: The objection is sustained.

Mr. Bourquin: Q. Did your posted prices in New York on wines of this character maintain or decrease following the filings you have shown us here in evidence?

Mr. Naus: One moment. Objected to as assuming that after April, 1943, there were any posted or published prices of wines in this class, and on the further ground the witness has negatived [283] the idea that they ever posted or published any after May, 1943.

The Court: You said after May?

Mr. Bourquin: I did, your Honor.

The Court: Sustained.

Mr. Bourquin: Q. Did your acquaintance with the wine business continue after May, 1943?

A. It did.

Q. You were just as anxious then to get wine, were you? A. Yes.

Q. Just as anxious to get as many wines as you. could get, is that right? A. Yes.

Q. Did the wine prices in New York on wines of this type fall off after May of 1943? Did they fall off after May, 1943?

A. Oh, no, they went up.

Mr. Bourquin: That is all, Mr. Elman.

Mr. Naus: No further questions. [284]

Mr. Bourquin: That, your Honor, is the plaintiff's case.

(Plaintiff rests)

Mr. Naus: At this point, if the Court please, without waiving any rights under Rule 50, I will call Jean Bercut.